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A

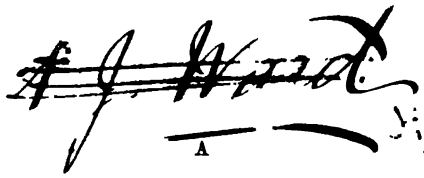
SELECTION

OF

LEGAL MAXIMS.

Maxims are the condensed Good Sense of Nations.—Sir J. Mackintosh.

Juris Præcepta sunt hæc; honeste vivere, alterum non lædere suum cuique tribuere.—I. 1. 1. 3.



A

SELECTION

OF

LEGAL MAXIMS,

Classified and Illustrated.

By HERBERT BROOM, LL.D.

THE SIXTH EDITION

BY

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LONDON:

W. MAXWELL & SON, 8, BELL YARD, TEMPLE BAR.

Law Booksellers and Publishers.

MEREDITH, RAY, & LITTLER, MANCHESTER;
HODGES, FIGGIS, & CO., AND E. PONSONBY, DUBLIN;
CHARLES F. MAXWELL, MELBOURNE AND SYDNEY.

1884.

LONDON
BRADBURY, AGNEW, & CO., PRINTERS, WHITEFRIARS.

PREFACE TO THE SIXTH EDITION.

THE reader will find the Maxims, except in one instance, arranged in the same order as heretofore, and the system adopted by the late Dr. Broom in the preparation of the earlier editions of the Work has been followed. The Index alone has been re-arranged; each principal Maxim is inserted in the Index (as well as in the "List of Maxims" at the beginning of the Book), with references to the various heads of Law treated under it.

A large number of the earlier decisions collected by the late Dr. Broom have been retained in the notes. It may be thought that a considerable portion of these decisions might have been expunged as being obsolete. The reason for their retention is a twofold one; first, many of the old cases are elaborate treatises on the law they deal with, and are worthy of careful perusal by the student; secondly, they were collected, not from digests, but, after a laborious search, from the Reports themselves. To strike them out would compel a reference to the earlier editions, in which alone many of

them are to be found, and to which, in process of time, access would necessarily become difficult.

The present Editors desire to express their respectful thanks to the Lord Justice Lindley for the loan of his copy of a former Edition, noted up by himself with recent decisions bearing upon many of the Maxims discussed in the text; most of these cases are inserted in the notes to this Edition. The Editors were further aided by several valuable suggestions of Mr. S. P. Micholls, of 3, King's Bench Walk, Temple, who assisted them in the correction of the proofs; also by certain manuscript notes of the Author, prepared with a view to a fresh edition of the Book.

H. F. M.
C. C.

TEMPLE,
October, 1884.

PREFACE TO THE FIRST EDITION.

In the Legal Science, perhaps more frequently than in any other, reference must be made to first principles. Indeed, a very limited acquaintance with the earlier Reports will show the importance which was attached to the acknowledged Maxims of the Law, in periods when civilization and refinement had made comparatively little progress. In the ruder ages, without doubt, the great majority of questions respecting the rights, remedies, and liabilities of private individuals, were determined by an immediate reference to such Maxims, many of which obtained in the Roman Law, and are so manifestly founded in reason, public convenience, and necessity, as to find a place in the code of every civilized nation. In more modern times, the increase of commerce, and of national and social intercourse, has occasioned a corresponding increase in the sources of litigation, and has introduced many subtleties and nice distinctions, both in legal reasoning and in the application of legal principles, which were formerly unknown. This change, however, so far from diminishing the value of simple

fundamental rules, has rendered an accurate acquaintance with them the more necessary, in order that they may be either directly applied, or qualified, or limited, according to the exigencies of the particular case, and the novelty of the circumstances which present themselves. If, then, it be true, that a knowledge of first principles is at least as essential in Law as in other sciences, certainly in none is a knowledge of those principles, unaccompanied by a sufficient investigation of their bearing and practical application, more likely to lead into grievous error.

In the present Work I have endeavoured, not only to point out the most important Legal Maxims, but also to explain and illustrate their meaning; to show the various exceptions to the rules which they enunciate, and the qualifications which must be borne in mind when they are applied. I have devoted considerable time, and much labour, to consulting the Reports, both ancient and modern, as also the standard Treatises on leading branches of the Law, in order to ascertain what Maxims are of most practical importance, and most frequently cited, commented on, and applied. I have likewise repeatedly referred to the various Collections of Maxims which have heretofore been published, and have freely availed myself of such portions of them as seemed to possess any value or interest at the present day. I venture, therefore, to hope, that very few Maxims have been omitted which ought to have found place in a work

like that now submitted to the Profession. In illustrating each Rule, those Cases have in general been preferred as examples in which the particular Maxim has either been cited, or directly stated to apply. It has, however, been necessary to refer to many other instances in which no such specific reference has been made, but which seem clearly to fall within the principle of the Rule; and whenever this has been done, sufficient authorities have, it is hoped, been appended, to enable the reader, without very laborious research, to decide for himself whether the application suggested has been correctly made, or not.

In arranging the Maxims which have been selected as above mentioned, the system of Classification has, after due reflection, been adopted: first, because this arrangement appeared better calculated to render the Work, to some extent, interesting as a treatise, exhibiting briefly the most important Rules of Law, and not merely useful as a book of casual reference; and, secondly, because by this method alone can the intimate connection which exists between Maxims appertaining to the same class be directly brought under notice and appreciated. It was thought better, therefore, to incur the risk of occasional false or defective classification, than to pursue the easier course of alphabetical arrangement. An Alphabetical List has, however, been appended, so that immediate reference may be made to any required Maxim. The

plan actually adopted may be thus stated:—I have, in the first Two Chapters, very briefly treated of Maxims which relate to Constitutional Principles, and the mode in which the Laws are administered. These, on account of their comprehensive character, have been placed first in order, and have been briefly considered, because they are so very generally known, and so easily comprehended. After these are placed certain Maxims which are rather deductions of reason than Rules of Law, and consequently admit of illustration only. Chapter IV. comprises a few principles which may be considered as fundamental, and not referable exclusively to any of the subjects subsequently noticed, and which follow thus: Maxims relating to Property, Marriage, and Descent; the Interpretation of Written Instruments in general; Contracts; and Evidence. Of these latter subjects, the Construction of Written Instruments, and the Admissibility of evidence to explain them, as also those Maxims which embody the Law of Contracts, have been thought the most practically important, and have therefore been noticed at the greatest length. The vast extent of these subjects has undoubtedly rendered the work of selection and compression one of considerable labour; and it is feared that many useful applications of the Maxims selected have been omitted, and that some errors have escaped detection. It must be remarked, however, that, even had the bulk of this Volume been materially increased, many important branches of Law to which the

Maxims apply must necessarily have been dismissed with very slight notice; and it is believed that the reader will not expect to find, in a Work on Legal Maxims, subjects considered in detail, of which each presents sufficient materials for a separate Treatise.

One question which may naturally suggest itself remains to be answered: For what class of readers is a Work like the present intended? I would reply, that it is intended not only for the use of students purposing to practise at the bar, or as attorneys, but also for the occasional reference of the practising barrister, who may be desirous of applying a Legal Maxim to the case before him, and who will therefore search for similar, or, at all events, analogous cases, in which the same principle has been held applicable and decisive. The frequency with which Maxims are not only referred to by the Bench, but cited and relied upon by Counsel in their arguments; the importance which has, in many decided cases, been attached to them; the caution which is always exercised in applying, and the subtlety and ingenuity which have been displayed in distinguishing between them, seem to afford reasonable grounds for hoping, that the mere Selection of Maxims here given may prove useful to the Profession, and that the examples adduced, and the authorities referred to by way of illustration, qualification, or exception, may, in some limited degree, add to their utility.

In conclusion, I have to express my acknowledgments to several Professional Friends of Practical experience, ability, and learning, for many valuable suggestions which have been made, and much useful information which has been communicated, during the preparation of this Work, and of which I have very gladly availed myself. For such defects and errors as will, doubtless, notwithstanding careful revision, be apparent to the reader, it must be observed, that I alone am responsible. It is believed, however, that the Professional Public will be inclined to view with some leniency this attempt to treat, more methodically than has hitherto been done, a subject of acknowledged importance, and one which is surrounded with considerable difficulty.

HERBERT BROOM.

TEMPLE,
January 30th, 1845.

CONTENTS.

CHAPTER I.

SECT. I.—RULES FOUNDED ON PUBLIC POLICY.

PAGE

Salus populi suprema lex 1
Necessitas inducit privilegium quoad jura privata . . . 9
Summa ratio est quæ pro religione facit 14
Dies Dominicus non est juridicus 16

SECT. II.—RULES OF LEGISLATIVE POLICY.

Leges posteriores priores contrarias abrogant 20
Nova constitutio futuris formam imponere debet, non præteritis 28
Ad ea quæ frequentius accidunt jura adaptantur . . . 35

CHAPTER II.

MAXIMS RELATING TO THE CROWN.

Rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem 40
Rex nunquam moritur 43
Rex non potest peccare 46
Non potest Rex gratiam facere cum injuriâ et damno aliorum 59
Nullum tempus occurrit Regi 61
Quando jus Domini Regis et subditi concurrunt, jus Regis præferri debet 65
Roy n'est lié per ascun statute, si il ne soit expressement nosmé 68
Nemo patriam in quâ natus est exuere nec ligeantiæ debitum ejurare possit 71

CHAPTER III.

SECT. I.—THE JUDICIAL OFFICE.

PAGE

Boni judicis est ampliare jurisdictionem 75
De fide et officio judicis non recipitur quæstio, sed de scientiâ sive sit error juris sive facti 80
Qui jussu judicis aliquod fecerit non videtur dolo malo fecisse, quia parere necesse est 88
Ad quæstionem facti non respondent judices, ad quæstionem legis non respondent juratores 96
In præsentiâ majoris cessat potentia minoris 105

SECT. II.—THE MODE OF ADMINISTERING JUSTICE.

Audi alteram partem 106
Nemo debet esse judex in propriâ suâ causâ 110
Actus curiæ neminem gravabit 116
Actus legis nemini est damnosus 120
Executio juris non habet injuriam 121
In fictione juris semper æquitas existit 124
Cursus curiæ est lex curiæ 129
Consensus tollit errorem 131
Communis error facit jus 134
De minimis non curat lex 138
Omnis innovatio plus novitate perturbat quam utilitate prodest 141

CHAPTER IV.

RULES OF LOGIC.

Ubi eadem ratio ibi idem jus 147
Cessante ratione legis cessat ipsa lex 153
De non apparentibus et non existentibus eadem est ratio . . 156
Non potest adduci exceptio ejusdem rei cujus petitur dissolutio 158
Allegans contraria non est audiendus. 161

PAGE
Omne majus continet in se minus 168
Quod ab initio non valet in tractu temporis non convalescit . 171
Argumentum ab inconvenienti plurimum valet in lege . . 177

CHAPTER V.

Fundamental Legal Principles.

Ubi jus ibi remedium 181
Quod remedio destituitur ipsâ re valet si culpa absit . . . 206
In jure non remota causa sed proxima spectatur 211
Actus Dei nemini facit injuriam 224
Lex non cogit ad impossibilia 237
Ignorantia facti excusat, ignorantia juris non excusat . . 246
Volenti non fit injuria 262
Nullus commodum capere potest de injuria suâ propriâ . . 273
Acta exteriora indicant interiora secreta 293
Res ipsa loquitur 298
Actus non facit reum nisi mens sit rea 300
Nemo debet bis vexari pro unâ et eâdem causâ 316

CHAPTER VI.

Acquisition, Enjoyment, and Transfer of Property.

Sect. I.—The Mode of Acquiring Property.

Qui prior est tempore, potior est jure 335

Sect. II.—Property—its Rights and Liabilities.

Sic utere tuo ut alienum non lædas 347
Cujus est solum ejus est usque ad cœlum 371
Quicquid plantatur solo solo cedit 376
Domus sua cuique est tutissimum refugium 404

SECT. III.—THE TRANSFER OF PROPERTY.

PAGE
Alienatio rei præfertur juri accrescendi 414
Cujus est dare ejus est disponere 430
Assignatus utitur jure auctoris 434
Cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit 444
Accessorium non ducit sed sequitur suum principale . . . 457
Licet dispositio de interesse futuro sit inutilis tamen fieri potest declaratio præcedens quæ sortiatur effectum interveniente novo actu 464

CHAPTER VII.

RULES RELATING TO MARRIAGE AND DESCENT.

Consensus, non concubitus, facit matrimonium 468
Hæres legitimus est quem nuptiæ demonstrant 480
Nemo est hæres viventis 486
Hæreditas nunquam ascendit 489
Persona conjuncta æquiparatur interesse proprio . . . 493

CHAPTER VIII.

THE INTERPRETATION OF DEEDS AND WRITTEN INSTRUMENTS.

Benignæ faciendæ sunt interpretationes propter simplicitatem laicorum ut res magis valeat quam pereat; et verba intentioni, non e contra, debent inservire 498
Ex antecedentibus et consequentibus fit optima interpretatio. 533
Noscitur à sociis 541
Verba chartarum fortius accipiuntur contra proferentem . 548
Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur . . 561

PAGE

Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est 573
Certum est quod certum reddi potest 578
Utile per inutile non vitiatur 581
Falsa demonstratio non nocet 584
Verba generalia restringuntur ad habilitatem rei vel personam 600
Expressio unius est exclusio alterius 606
Expressio eorum quæ tacite insunt nihil operatur . . . 625
Verba relata hoc maxime operantur per referentiam ut in eis inesse videntur 628
Ad proximum antecedens fiat relatio nisi impediatur sententia 636
Contemporanea expositio est optima et fortissima in lege . 638
Qui hæret in literâ hæret in cortice 641

CHAPTER IX.

The Law of Contracts.

Modus et conventio vincunt legem 645
Quilibet potest renunciare juri pro se introducto . . . 655
Qui sentit commodum sentire debet et onus 661
In æquali jure melior est conditio possidentis . . . 667
Ex dolo malo non oritur actio 684
Ex nudo pacto non oritur actio 699
Caveat emptor 723
Quicquid solvitur, solvitur secundum modum solventis—quicquid recipitur, recipitur secundum modum recipientis 770
Qui per alium facit per seipsum facere videtur . . . 777
Respondeat superior 798
Omnis ratihabitio retrotrahitur et mandato priori æquiparatur 822
Nihil tam conveniens est naturali æquitati quam unumquodque dissolvi eo ligamine quo ligatum est . . . 832
Vigilantibus, non dormientibus, jura subveniunt . . . 844
Actio personalis moritur cum personâ 855

CHAPTER X.

MAXIMS APPLICABLE TO THE LAW OF EVIDENCE.

PAGE

Optimus interpres rerum usus 871
Cuilibet in suâ arte perito est credendum 885
Omnia præsumuntur contra spoliatorem 892
Omnia præsumuntur ritè et solenniter esse acta . . . 896
Res inter alios acta alteri nocere non debet 908
Nemo tenetur seipsum accusare 922

ALPHABETICAL

LIST OF LEGAL MAXIMS.

*** *Throughout this List, Wingate's Maxims are indicated by the letter* (W). *Lofft's Reports* (*Ed.* 1790), *to which is appended a very copious Collection of Maxims, are signified by the letter* (L). *The Grounds and Rudiments of Law* (*Ed.* 1751), *by the letter* (G); *and Halkerston's Maxims* (*Ed.* 1823), *by the letter* (H); *the reference in the last instance only being to the number of the* Page, *in the others to that of the* Maxim. *Of the above Collections, as also of those by Noy* (9*th Ed.*), *and Branch* (5*th Ed.*), *use has, in preparing the following List, been freely made. Some few Maxims from the Civil Law have also been inserted, the Digest being referred to by the letter* (D), *as in the body of the Work.*

The figures at the end of the line without the Parentheses denote the pages of this Treatise where the Maxim is commented upon or cited.

	PAGE
A COMMUNI observantiâ non est recedendum (W. 203).	
Ab abusu ad usum non valet consequentia (*a*).	
Absoluta sententia expositore non indiget (2 Inst. 533).	
Abundans cautela non nocet (11 Rep. 6).	
Accessorium non ducit, sed sequitur, suum principale	457
Accessorium non trahit principale	465
Accusator post rationabile tempus non est audiendus, nisi se bene de omissione excusaverit (Moor, 817).	
Acta exteriora indicant interiora secreta	293
Actio non datur non damnificato (Jenk. Cent. 69).	
Actio personalis moritur cum personâ	443, 855
Actio quælibet it suâ viâ (Jenk. Cent. 77).	
Actionum genera maxime sunt servanda (L. 460).	
Actor sequitur forum rei (Branch M. 4).	
Actore non probante absolvitur reus (Hob. 103).	
Actori incumbit onus probandi (Hob. 103).	
Actus curiæ neminem gravabit .	116
Actus Dei nemini facit injuriam	224

(*a*) In *Stockdale* v. *Hansard*, 9 Ad. & E. 116, Lord Denman, C.J., observes, that the above maxim cannot apply "where an abuse is directly charged and offered to be proved."

PAGE

Actus Dei nemini nocet . . . 236

Actus incæptus cujus perfectio pendet ex voluntate partium revocari potest, si autem pendet ex voluntate tertiæ personæ vel ex contingenti revocari non potest (a) (Bac. Max. reg. 20).

Actus judiciarius coram non judice irritus habetur, de ministeriali autem a quocunque provenit ratum esto (L. 458).

Actus legis nemini est damnosus . 120

Actus legis nemini facit injuriam . 120

Actus legitimi non recipiunt modum (Hob. 153).

Actus non facit reum nisi mens sit rea 293, 300, 769 (y)

Ad ea quæ frequentius accidunt jura adaptantur 35, 36

Ad quæstionem facti non respondent judices—ad quæstionem legis non respondent juratores . . . 96

Ad quæstionem legis respondent judices 892

Ædificare in tuo proprio solo non licet quod alteri noceat . . . 351

Æquitas sequitur legum (Branch M. 8).

Affectus punitur licet non sequitur effectus (9 Rep. 56).

Affirmanti non neganti incumbit probatio (H. 9).

Alienatio licet prohibeatur consensu tamen omnium in quorum favorem prohibita est potest fieri (Co. Litt. 98).

Alienatio rei præfertur juri accrescendi 414

Aliquid conceditur ne injuria remanerit impunita quod alias non concederetur (Co. Litt. 197).

PAGE

Aliquis non debet esse judex in propriâ causâ, quia non potest esse judex et pars 111

Aliud est celare—aliud tacere . . 738

Aliud est possidere—aliud esse in possessione (Hob. 163).

Allegans contraria non est audiendus 161, 167, 287

Allegans suam turpitudinem non est audiendus (4 Inst. 279).

Allegari non debuit quod probatum non relevat (1 Chan. Cas. 45).

Alterius circumventio alii non præbet actionem (D. 50. 17. 49).

Ambigua responsio contra proferentem est accipienda (10 Rep. 68).

Ambiguis casibus semper præsumitur pro rege (L. 248).

Ambiguitas verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum verificatione facti tollitur 561

Ambiguitas verborum patens nullâ verificatione excluditur (L. 249).

Ambulatoria est voluntas defuncti usque ad vitæ supremum exitum . 466

Angliæ jura in omni casu libertati dant favorem (H. 12).

Animus hominis est anima scripti (3 Bulstr. 67).

A non posse ad non esse sequitur argumentum necessarie negativè licet non affirmativè (Hob. 336).

Applicatio est vita regulæ (2 Bulstr. 79).

Arbitramentum æquum tribuit cuique suum (Noy, M. 248).

Argumentum ab auctoritate est for-

(a) The law, observes Lord Bacon, makes this difference, that, if the parties have put it in the power of a third person, or of a contingency, to give a perfection to their act, then they have put it out of their own reach and liberty to revoke it; but where the completion of their act or contract depends upon the mutual consent of the original parties only, it may be rescinded by express agreement. So, in judicial acts, the rule of the civil law holds, *sententia interlocutoria revocari potest*, that is, an order may be revoked, but a judgment cannot.—Bac. M. reg. 20.

PAGE

tissimum in lege (Co. Litt. 254).
Argumentum ab impossibili plurimum valet in lege (Co. Litt. 92).
Argumentum ab inconvenienti plurimum valet in lege 177
Argumentum à communiter accidentibus in jure frequens est . . 38 (d)
Argumentum à divisione est fortissimum in jure (6 Rep. 60). (W. 71).
Argumentum à majori ad minus negativè non valet—valet e converso (Jenk. Cent. 281).
Argumentum à simili valet in lege (Co. Litt. 191).
Assignatus utitur jure auctoris . . 434
Aucupia verborum sunt judice indigna (Hob. 343).
Audi alteram partem . . . 106

Bello parta cedunt reipublicæ (cited 2 Russ. & My. 56).
Benedicta est expositio quando res redimitur à destructione (4 Rep. 26).
Benignæ faciendæ sunt interpretationes, propter simplicitatem laicorum, ut res magis valeat quam pereat 498
Benignè faciendæ sunt interpretationes et verba intentioni debent inservire 498
Benignior sententia, in verbis generalibus seu dubiis, est preferenda (4 Rep. 15).
Bonæ fidei possessor, in id tantum quod ad se pervenerit tenetur (2 Inst. 285).
Bona fides non patitur, ut bis idem exigatur . . . 324, n. (a)
Boni judicis est ampliare jurisdictionem 75
Boni judicis est judicium sine dilatione mandare executioni (Co. Litt. 289).

PAGE

Boni judicis est lites dirimere, ne lis ex lite oritur, et interest reipublicæ ut sint fines litium (4 Rep. 15).
Bonus judex secundum æquum et bonum judicat, et æquitatem stricto juri præfert 76

Casus omissus et oblivioni datus dispositioni communis juris relinquitur 39
Causa proxima et non remota spectatur. . . . 212, 213, 216, 222
Caveat emptor; qui ignorare non debuit quod jus alienum emit . 723
Caveat venditor (L. 328).
Certa debet esse intentio, et narratio, et certum fundamentum, et certa res quæ deducitur in judicium (Co. Litt. 303, a).
Certum est quod certum reddi potest 578
Cessante causâ, cessat effectus . . 153
Cessante ratione legis, cessa ipsa lex 153, 154, 155
Cessante statu primitivo, cessat derivativus 462
Charta de non ente non valet (Co. Litt. 36, a).
Chirographum apud debitorem repertum præsumitur solutum (H. 20).
Circuitus est evitandus . . . 329
Clausulæ inconsuetæ semper inducunt suspicionem 283
Clausula generalis de residuo non ea complectitur quæ non ejusdem sint generis cum iis quæ speciatim dicta fuerant (L. 419).
Clausula generalis non refertur ad expressa (8 Rep. 154).
Clausula vel dispositio inutilis, per presumptionem vel causam remotam ex post facto non fulcitur . . 628
Cohæredes una persona censentur propter unitatem juris quod habent (Co. Litt. 163).

PAGE

Communis error facit jus . . 134, 135, 137, 144

Conditio beneficialis quæ statum construit, benignè, secundum verborum intentionem, est interpretanda; odiosa, autem, quæ statum destruit, strictè, secundum verborum proprietatem accipienda (8 Rep. 90).

Conditio præcedens adimpleri debet priusquam sequatur effectus (Co. Litt. 201).

Conditiones quælibet odiosæ; maxime autem contra matrimonium et commercium (L. 644).

Confirmare nemo potest priusquam jus ei acciderit (10 Rep. 48).

Confirmatio omnes supplet defectus, licet id quod actum est ab initio non valuit (Co. Litt. 295, b).

Consensus, non concubitus, facit matrimonium 468

Consensus tollit errorem . . . 131

Consentientes et agentes pari pœnâ plectentur (5 Rep. 80).

Consentire matrimonio non possunt infra annos nubiles (5 Rep. 80).

Constitutiones tempore posteriores potiores sunt his quæ ipsas præcesserunt . . . . . 22 (i)

Constructio legis non facit injuriam . 556

Consuetudo ex certâ causâ rationabili usitata privat communem legem 873

Consuetudo loci est observanda . . 872

Consuetudo manerii et loci observanda est (Branch M. 28).

Consuetudo neque injuriâ oriri neque tolli potest (L. 340).

Consuetudo regni Angliæ est lex Angliæ (Jenk. Cent. 119).

Consuetudo semel reprobata non potest amplius induci (G. 53).

Contemporanea expositio est optima et fortissima in lege 638

PAGE

Contra negantem principia non est disputandum (G. 57).

Contra non valentem agere nulla currit præscriptio 854

Conventio privatorem non potest publico juri derogare (W. 201).

Copulatio verborum indicat acceptationem in eodem sensu . . . 541

Corporalis injuria non recipit æstimationem de futuro 273

Cuicunque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit 445

Cuilibet in suâ arte perito est credendum 885

Cui licet quod majus non debet quod minus est non licere . . . 169

Cujus est dare ejus est disponere 430, 433

Cujus est solum, ejus est usque ad cœlum 371

Culpâ caret, qui scit, sed prohibere non potest (D. 50. 17. 50).

Culpa est immiscere se rei ad se non pertinenti (D. 50. 17. 36).

Cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est 538

Cum in testamento ambigue aut etiam perperam scriptum est benigne interpretari et secundum id quod credibile est cogitatum credendum est 524

Cum principalis causa non consistit, ne ea quidem quæ sequuntur, locum habent (D. 50. 17. 129. § 1).

Curia parliamenti suis propriis legibus subsistit 80

Cursus curiæ est lex curiæ . . . 129

Damnum sine injuriâ esse potest (H. 12).

Debile fundamentum fallit opus . 174

Debita sequuntur personam debitoris (H. 13).

PAGE

Debitor non præsumitur donare (*a*) (H. 13).
Debitorum pactionibus creditorum petitio nec tolli nec minui potest . 653
Debitum et contractus sunt nullius loci (*b*). (7 Rep. 61).
Deficiente uno non potest esse hæres (G. 77).
De fide et officio judicis non recipitur quæstio, sed de scientiâ sive sit error juris sive facti 80
De gratiâ speciali, certâ scientiâ, et mero motu ; talis clausula non valet in his in quibus præsumitur principem esse ignorantem (1 Rep. 53).
Delegata potestas non potest delegari 794
Delegatus debitor est odiosus in lege (2 Bulstr. 148).
Delegatus non potest delegare . 840, 842
De minimis non curat lex, 138, 139, 140, 158 (c).
De non apparentibus, et non existentibus, eadem est ratio . . . 156
Derivativa potestas non potest esse major primitivâ (W. 26).
Deus solus hæredem facere potest, non homo 580
Dies dominicus non est juridicus . 16
Discretio est discernere per legem quid sit justum 78
Divinatio, non interpretatio est, quæ omninò recedit à literâ (Bac. Max. reg. 3).
Dolo malo pactum se non servaturum 686
Dolosus versatur in generalibus . . 282
Dominium non potest esse in pendenti (H. 39).

PAGE

Domus sua cuique est tutissimum refugium 404
Dona clandestina sunt semper suspiciosa 283
Donari videtur, quod nullo jure cogente conceditur (D. 50. 17. 82).
Donatio non præsumitur (Jenk. Cent. 109).
Donatio perficitur possessione accipientis (Jenk. Cent. 109).
Duo non possunt in solido unam rem possidere . . . . 434 (x)

EADEM mens præsumitur regis quæ est juris, et quæ esse debet, præsertim in dubiis 47
Ea quæ commendandi causâ in venditionibus dicuntur si palam appareant venditorem non obligant . . 736
Ea quæ raro accidunt, non temere in agendis negotiis computantur (D. 50. 17. 64).
Ecclesia ecclesiæ decimas solvere non debet (Cro. El. 479).
Ecclesia meliorari non deteriorari potest (*c*).
Ejus est interpretari cujus est condere 142
Eodem ligamine quo ligatum est dissolvitur. 843
Eodem modo quo quid constituitur, eodem modo dissolvitur—destruitur (6 Rep. 53).
Ex antecedentibus et consequentibus fit optima interpretatio . . . 533
Exceptio probat regulam (11 Rep. 41). (*d*).
Excusat aut extenuat delictum in capi-

(*a*) See *Kippen* v. *Darley*, 3 Macq. Sc. App. Cas. 203.

(*b*) See the Note to *Mostyn* v. *Fabrigas*, 1 Smith, L. C. ; Story, Confl. Laws, tit. "*Contracts.*"

(*c*) Arg., *A.-G.* v. *Cholmley*, 2 Eden, 313.

(*d*) "Every exception that can be accounted for is so much a confirmation of the rule, that it has become a maxim, *exceptio probat regulam*," per Lord Kenyon, C.J., 3 T. R. 722. See also, Id. 38 ; 4 T. R. 793 ; 1 East, 647, n. ; per Lord Campbell, C.J., 4 E. & B. 832 ; arg. *Lyndon* v. *Standbridge*, 2 H. & N. 48.

PAGE

talibus quod non operatur idem in civilibus 314
Ex diuturnitate temporis omnia præsumuntur rite et solenniter esse acta 896
Ex dolo malo non oritur actio . 288, 684
Executio juris non habet injuriam, 121, 123
Ex maleficio non oritur contractus . 689
Ex nudâ submissione non oritur actio (G. 143).
Ex nudo pacto non oritur actio . . 699
Expedit reipublicæ ne suâ re quis male utatur 348
Expressa nocent, non expressa non nocent (D. 50. 17. 195).
Expressio eorum quæ tacitè insunt nihil operatur . . . 625, 709
Expressio unius est exclusio alterius . 606
Expressum facit cessare tacitum . 606
Extra territorium jus dicenti impune non paretur 94
Ex turpi causâ non oritur actio . . 634

FACTUM à judice, quod ad officium ejus non pertinet ratum non est (D. 50. 17. 170) . . . . . 88, n. (y)
Falsa demonstratio non nocet . . 585
Falsus in uno falsus in omnibus (a).
Fictio legis iniquè operatur alicui damnum vel injuriam . . . 127, 129
Fortior est custodia legis quam hominis (2 Rol. Rep. 325).
Fortior et potentior est dispositio legis quam hominis . . . 653, 654
Fractionem diei non recipit lex (L. 572).
Frater fratri uterino non succedet in hæreditate paternâ . . . 491

PAGE

Fraus est celare fraudem (1 Vern. 240).
Fraus est odiosa et non præsumenda (Cro. Car. 550).
Fraus et dolus nemini patrocinari debent 288
Frequentia actûs multum operatur (4 Rep. 78) (W. 192).
Frustrà fit per plura, quod fieri potest per pauciora (Jenk. Cent. 68) (W. 177) (G. 161).
Frustrà legis auxilium quærit qui in legem committit . . . 274, 289
Frustrà probatur quod probatum non relevat (H. 50).
Furiosus absentis loco est (D. 50. 17. 124. § 1).
Furtum non est ubi initium habet detentionis per dominum rei (3 Inst. 197).

GENERALE, nihil certi implicat (W. 164).
Generalia specialibus non derogant (Jenk. Cent. 120) (b).
Generalia verba sunt generaliter intelligenda 602
Generalibus specialia derogant (H. 51).
Generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa (8 Rep. 154).
Generalis regula generaliter est intelligenda (6 Rep. 65).

HABEMUS optimum testem confitentem reum (Fost. Cr. L. 243) (c).

(a) This maxim may properly be applied in those cases only where a witness speaks to a fact with reference to which he cannot be presumed liable to mistake; see *per* Story, J., *The Santissima Trinidad*, 7 Wheaton (U.S.), R. 338, 339.

(b) Cited *E. of Derby* v. *Bury Impt. Coms.*, L. R. 4 Ex. 226; *Kidston* v. *Empire Ins. Co.*, L. R. 1 C. P. 546; arg. *Thames Conservators* v. *Hall*, L. R. 3 C. P. 419.

(c) In the various treatises upon the law of evidence will be found remarks as to the weight which should be attached to the confession of a

PAGE

Hæredi magis parcendum est (D. 31. 1. 47).
Hæreditas nihil aliud est, quam successio in universum jus, quod defunctus habuerit (D. 50. 17. 62).
Hæreditas nunquam ascendit . . 489
Hæres est aut jure proprietatis aut jure representationis (3 Rep. 40).
Hæres est nomen juris, filius est nomen naturæ (Bac. M. reg. 11).
Hæres legitimus est quem nuptiæ demonstrant 480

Id certum est quod certum reddi potest 578
Idem est non esse et non apparere . 158
Id possumus quod de jure possumus (G. 183).
Id, quod nostrum est, sine facto nostro ad alium transferri non potest (D. 50. 17. 11).
Ignorantia eorum quæ quis scire tenetur non excusat 261
Ignorantia facti excusat; ignorantia juris non excusat . . . 246, 248
Ignorantia juris, quod quisque scire tenetur, neminem excusat . 247, 257
Ignorantia legis neminem excusat 247 (n)
Imperitia culpæ adnumeratur (D. 50. 17. 132).
Impossibilium nulla obligatio est . 242
Impotentia excusat legem . . 237, 238
In æquali jure melior est conditio possidentis 667
In ambiguâ voce legis ea potius accipienda est significatio quæ vitio caret, præsertim cum etiam voluntas legis ex hoc colligi possit . . . 532

PAGE

In ambiguis orationibus maxime sententia spectanda est ejus, qui eas protulisset 524
In Angliâ non est interregnum . . 43
Incaute factum pro non facto habetur (D. 28. 4. 1).
Incerta pro nullis habentur (G. 191).
Incivile est, nisi totâ sententiâ inspectâ de aliquâ parte judicare (G. 194).
In consimili casu, consimile debet esse remedium (G. 195).
In contractis tacitè insunt quæ sunt moris et consuetudinis . . . 798
In conventionibus contrahentium voluntas potius quam verba spectari placuit 509
In criminalibus sufficit generalis malitia intentionis cum facto paris gradûs 314
In disjunctivis sufficit alteram partem esse veram 545
In eo, quod plus sit, semper inest et minus (D. 50. 17. 110).
In favorem vitæ libertatis et innocentiæ omnia præsumuntur (L. 125).
In fictione juris semper æquitas existit 124, 129
In judicio non creditur nisi juratis (Cro. Car. 64).
In jure, non remota causa, sed proxima spectatur . . 211, 810 (z)
Injuria non excusat injuriam . . 370
Injuria non præsumitur (Co. Litt. 232. b).
In majore summâ continetur mino (5 Rep. 115).
In odium spoliatoris omnia præsumuntur 8

party. Respecting the above maxim, Lord Stowell has observed, that, "What is taken *pro confesso* is taken as indubitable truth. The plea of guilty by the party accused shuts out all further inquiry. *Habemus confitentem reum* is demonstration, *unle indirect motives can be assigned to it.*" *Mortimer* v. *Mortimer*, 2 Hagg. 315.

PAGE

In omnibus quidem, maxime tamen in jure, æquitas spectanda sit (D. 50. 17. 90).
In pari causâ possessor potior haberi debet 669
In pari delicto potior est conditio defendentis 673
In pari delicto potior est conditio possidentis 673
In pœnalibus causis benignius interpretandum est (D. 50. 17. 155. § 1).
In præsentiâ majoris cessat potentia minoris 105, 106
In stipulationibus cum quæritur quid actum sit verba contra stipulatorem interpretanda sunt . . . 554
Intentio cæca mala (2 Bulstr. 179).
Intentio inservire debet legibus non leges intentioni (Co. Litt. 314. b).
Interest reipublicæ ne maleficia remaneant impunita (Jenk. Cent. 31). (W. 140).
Interest reipublicæ suprema hominum testamenta rata haberi (Co. Litt. 236. b).
Interest reipublicæ ut sit finis litium 328
Interpretare et concordare leges legibus est optimus interpretandi modus (8 Rep. 169).
Interpretatio chartarum benigne facienda est ut res magis valeat quam pereat 498
In testamentis plenius testatoris intentionem scrutamur . . 513, 525
In testamentis plenius voluntates testantium interpretantur . . . 525
In toto et pars continetur (D. 50. 17. 113).
Invito beneficium non datur . 665 (t)
Ita semper fiat relatio ut valeat dispositio (6 Rep. 76).

PAGE

Judicium a non suo judice datum nullius est momenti 88
Judicium redditur in invitum (Co. Litt. 248. b).
Judicis est judicare secundum allegata et probata (H. 73).
Judicis est jus dicere non dare (L. 42).
Jura eodem modo destituuntur quo constituuntur . . . 833
Jure naturæ æquum est neminem cum alterius detrimento et injuriâ fieri locupletiorem (D. 50. 17. 206).
Jus accrescendi inter mercatores locum non habet pro beneficio commercii . 427
Jus constitui oportet in his quæ ut plurimum accidunt non quæ ex inopinato 36
Jus superveniens auctori accrescit successori (H. 76).

Leges et constitutiones futuris certum est, &c. 29
Leges posteriores priores contrarias abrogant 21
Le salut du peuple est la suprême loi 2 (a)
Lex aliquando sequitur æquitatem (3 Wils. 119).
Lex Angliæ sine parliamento mutari non potest (2 Inst. 619).
Lex beneficialis rei consimili remedium præstat (2 Inst. 689).
Lex citiùs tolerare vult privatum damnum quàm publicum malum (Co. Litt. 125).
Lex neminem cogit ad vana seu inutilia 246
Lex neminem cogit ostendere quod nescire præsumitur (L. 569).
Lex nil frustra facit 246
Lex non cogit ad impossibilia . . 237
Lex non favet votis delicatorum . 362
Lex non requirit verificari quod apparet curiæ (9 Rep. 54).

	PAGE
Lex plus laudatur quando ratione probatur	153
Lex posterior derogat priori	22
Lex rejicit superflua, pugnantia, incongrua (Jenk. Cent. 133, 140, 176).	
Lex semper dabit remedium	182
Lex semper intendit quod convenit rationi (Co. Litt. 78. b).	
Lex spectat naturæ ordinem	246
Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens quæ sortiatur effectum, interveniente novo actu.	464
Licita bene miscentur, formula nisi juris obstet (Bac. Max. reg. 24) (*a*).	
Linea recta semper præfertur transversali	490
Locus regit actum (*b*).	
Majus dignum trahit ad se minus dignum	169 (c)
Mala grammatica non vitiat chartam	642
Maledicta expositio quæ corrumpit textum	577
Malitia supplet ætatem	309
Malus usus est abolendus	876
Mandata licita strictam recipiunt interpretationem sed illicita latam et extensam (Bac. Max. reg. 16) (*c*).	
Mandatarius terminos sibi positos transgredi non potest (Jenk. Cent. 53).	
Matrimonia debent esse libera (H. 86).	
Meliorem conditionem suam facere potest minor, deteriorem nequaquam (Co. Litt. 337. b).	
Melior est conditio possidentis et rei quam actoris (4 Inst. 180).	668
Misera est servitus, ubi jus est vagum aut incertum.	143
Mobilia sequuntur personam	485
Modus de non decimando non valet (L. 427).	
Modus et conventio vincunt legem	645
Modus legem dat donationi	431
Multa conceduntur per obliquum quæ non conceduntur de directo (6 Rep. 47).	
Multa in jure communi, contra rationem disputandi, pro communi utilitate introducta sunt	152
Naturale est quidlibet dissolvi eo modo quo ligatur	833
Necessitas inducit privilegium	9
Necessitas inducit privilegium quoad jura privata	9
Necessitas publica major est quam privata	14
Necessitas quod cogit, defendit	13
Nemo agit in seipsum	210
Nemo contra factum suum venire potest (2 Inst. 66).	

(*a*) "The law," says Lord Bacon, "giveth that favour to lawful acts, that, although they be executed by several authorities, yet the whole act is good;" if, therefore, tenant for life and remainderman join in granting a rent, "this is one solid rent out of both their estates, and no double rent, or rent by confirmation:" Bac. Max. reg. 24; and if tenant for life and reversioner join in a lease for life reserving rent, this shall enure to the tenant for life only during his life, and afterwards to the reversioner. See 1 Crabb, Real Prop. 179.

(*b*) Citet arg. *Hodgson* v. *Beauchesne*, 12 Moo. P. C. C. 308; *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115.

(*c*) A principal is civilly liable for those acts only which are strictly within the scope of the agent's authority. But if a man incite another to do an unlawful act, he shall not, in the language of Lord Bacon, "excuse himself by circumstances not pursued;" as if he command his servant to rob I. D. on Shooter's Hill, and he doth it on Gad's Hill; or to kill him by poison, and he doth it by violence: Bac. Max. reg. 16, *cited Parkes* v. *Prescott*, L. R. 4 Ex. 169, 182.

PAGE

Nemo dat quod non habet . . 761
Nemo debet bis puniri pro uno delicto 330
Nemo debet bis vexari, si constat curiæ quod sit pro unâ et eâdem causâ 316, 328
Nemo debet esse judex in propriâ causâ 110
Nemo debet locupletari alienâ jacturâ (a).
Nemo debet locupletari ex alterius incommodo (Jenk. Cent. 4).
Nemo de domo suâ extrahi potest 404 (b)
Nemo ejusdem tenementi simul potest esse hæres et dominus (1 Reeves, Hist. Eng. L. 106).
Nemo enim aliquam partem rectè intelligere possit antequam totum iterum atque iterum perlegerit . 547
Nemo est hæres viventis . . . 486
Nemo ex alterius facto prægravari debet (See 1 Poth., by Evans, 133).
Nemo ex proprio dolo consequitur actionem 289
Nemo ex suo delicto meliorem suam conditionem facere potest (D. 50. 17. 134. § 1).
Nemo patriam in quâ natus est exuere nec ligeantiæ debitum ejurare possit 71
Nemo plus juris ad alium transferre potest quam ipse haberet . 436, 438
Nemo potest contra recordum verificare per patriam (2 Inst. 380).
Nemo potest esse simul actor et judex 111
Nemo potest esse tenens et dominus (Gilb. Ten. 142).
Nemo potest mutare consilium suum in alterius injuriam . . . 28
Nemo præsumitur alienam posteritatem suæ prætulisse (W. 285).

PAGE

Nemo punitur pro alieno delicto (W. 336).
Nemo sibi esse judex vel suis jus dicere debet 110, 116
Nemo tenetur ad impossibilia . 237, 239
Nemo tenetur divinare (4 Rep. 28).
Nemo tenetur seipsum accusare . . 922
Neque leges neque senatus-consulta ita scribi possunt ut omnes, &c. . 36
Nihil aliud potest rex quàm quod de jure potest (11 Rep. 74).
Nihil consensui tam contrarium est quàm vis atque metus (D. 50. 17. 116).
Nihil in lege intolerabilius est eandem rem diverso jure censeri (4 Rep. 93 a).
Nihil perfectum est dum aliquid restat agendum (9 Rep. 9 b).
Nihil præscribitur nisi quod possidetur (5 B. & Ald. 277).
Nihil quod est inconveniens est licitum 178, 348
Nihil simul inventum est et perfectum (b) (Co. Litt. 230).
Nihil tam conveniens est naturali æquitati quàm unumquodque dissolvi eo ligamine quo ligatum est . . . 832
Nil consensui tam contrarium est quàm vis atque metus . . 273 (l)
Nil facit error nominis cum de corpore vel personâ constat 588
Nil tam conveniens est naturali æquitati quàm voluntatem domini volentis rem suam in alium transferre ratum haberi (I. 2. 1. 40).
Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram . . . 597
Non aliter à significatione verborum recedi oportet quàm cum mani-

(a) Cited per Bovill, C.J., *Fletcher* v *Alexander* L. R. 3 C. P. 381.

(b) Applied to a patent, Arg., *Re Newall & Elliot*, 4 C. B., N. S., 290.

	PAGE
festum est aliud sensisse testatorem	525
Non dat qui non habet	436
Non debeo melioris conditionis esse, quàm auctor meus, à quo jus in me transit (D. 50. 17. 175. § 1).	
Non debet alteri per alterum iniqua conditio inferri (D. 50. 17. 74).	
Non debet cui plus licet, quod minus est, non licere	169
Non decipitur qui scit se decipi (5 Rep. 6).	
Non dubitatur, etsi specialiter venditor evictionem non, promiserit re evictâ, ex empto competere actionem	723
Non est novum ut priores leges ad posteriores trahantur :	22
Non ex opinionibus singulorum sed ex communi usu nomina exaudiri debent (D. 33. 10. 7. § 2).	
Non impedit clausula derogatoria quo minus ab eâdem potestate res dissolvantura quâ constituuntur	21
Non in tabulis est jus (10 East, 69).	
Non omnium quæ à majoribus nostris constituta sunt ratio reddi potest	150
Non possessori incumbit necessitas probandi possessiones ad se pertinere	668
Non potest adduci exceptio ejusdem rei cujus petitur dissolutio	158
Non potest probari quod probatum non relevat (*a*).	
Non potest rex gratiam facere cum injuriâ et damno aliorum	59
Non potest videri desisse habere, qui nunquam habuit (D. 50. 17. 208).	
Non quod dictum est, sed quod factum est, inspicitur (Co. Litt. 36. a) (*b*).	
Non videntur qui errant consentire	256
Non videtur consensum retinuisse si quis ex præscripto minantis aliquid immutavit	273
Non videtur quisquam id capere, quod ei necesse est alii restituere (D. 50. 17. 51).	
Noscitur à sociis	541
Nova constitutio, futuris formam imponere debet, non præteritis	28
Novatio non præsumitur (H. 109).	
Novum judicium non dat novum jus sed declarat antiquum (10 Rep. 42).	
Nul prendra advantage de son tort demesne	283
Nullâ pactione effici potest ut dolus præstetur	652
Nullum simile est idem (G. 467) (*c*).	
Nullum tempus occurrit regi	61
Nullus commodum capere potest de injuriâ suâ propriâ	163, 273
Nullus videtur dolo facere qui suo jure utitur	121
Nunquam crescit ex post facto præteriti delicti æstimatio	35
Nuptias non concubitus sed consensus facit	468
OMNE majus continet in se minus	168
Omne quod solo insædificatur solo cedit	376, *et seq.*
Omnes licentiam habere his, quæ pro se indulta sunt, renunciare	656
Omnia præsumuntur contra spoliatorem	892
Omnia præsumuntur ritè et solenniter esse acta donec probetur in contrarium	902

(*a*) See *A.-G.* v. *Hitchcock*, 1 Exch. 91, 92, 102.

(*b*) Cited *White* v. *Trustees of British Museum*, 6 Bing. 319; *Ilott* v. *Genge*, 8 Curt. 175.

(*c*) Cited 2 Bla. Com., 21st ed., 162; Co. Litt. 3 a.; Arg., 1 M. & S. 172; *per* Buller, J., 3 T. R. 664. See, *per* Knight-Bruce, L.J., *Boyse* v. *Rossborough*, 3 De G., M., & G., 846.

PAGE

Omnia præsumuntur ritè et solenniter esse acta 158, 896
Omnia quæ jure contrahuntur, contrario jure pereunt (D. 50. 17. 100).
Omnia quæ sunt uxoris sunt ipsius viri (Co. Litt. 112. a).
Omnis innovatio plus novitate perturbat quam utilitate prodest . . 141
Omnis ratihabitio retrotrahitur et mandato priori æquiparatur 713, 822
Omnium contributione sarciatur quod pro omnibus datum est (4 Bing. 121).
Optima est legis interpres consuetudo 884
Optima est lex quæ minimum relinquit arbitrio judicis, optimus judex qui minimum sibi . . . 78
Optimus interpres rerum usus 871, 878
Optimus legis interpres consuetudo . 641
Origine propriâ neminem posse voluntate suâ eximi manifestum est 73

Pacta conventa quæ neque contra leges neque dolo malo inita sunt omnimodo observanda sunt . . 654
Pacta dant legem contractui (H. 118).
Pacta quæ contra leges constitutionesque vel contra bonos mores fiunt, nullam vim habere, indubitati juris est 650
Pacta quæ turpem causam continent non sunt observanda . . . 687
Pactis privatorum juri publico non derogatur 651
Par in parem imperium non habet (Jenk. Cent. 174).
Pater est quem nuptiæ demonstrant. 481
Perpetua lex est nullam legem humanam ac positivam perpetuam esse, et clausula quæ abrogationem excludit ab initio non valet . . 21

PAGE

Persona conjuncta æquiparatur interesse proprio 493
Potestas suprema seipsam dissolvere potest, ligare non potest (Bac. Max. reg. 19).
Potior est conditio defendentis . . 669
Potior est conditio possidentis . 209, 667
Præsentia corporis tollit errorem nominis; et veritas nominis tollit errorem demonstrationis . . . 592
Præsumptio violenta valet in lege (Jenk. Cent. 56).
Prior tempore, potior jure . . 335
Privatis pactionibus non dubium est non lædi jus cæterorum . . 653
Privatorum conventio juri publico non derogat 650
Privilegium contra rem publicam non valet 14
Probandi necessitas incumbit illi qui agit (I. 2. 20. 4).
Protectio trahit subjectionem, et subjectio protectionem . . . 74

Quando abest provisio partis, adest provisio legis (cited 13 C. B. 960).
Quando aliquid mandatur, mandatur et omne per quod parvenitur ad illud 452
Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud. 455
Quando duo jura in unâ personâ concurrunt æquum est ac si essent in diversis 492
Quando jus domini regis et subditi concurrunt, jus regis præferri debet 65
Quando lex aliquid alicui concedit, conceditur et id sine quo res ipsa esse non potest 453
Quando lex est specialis ratio autem generalis generaliter lex est intelligenda (2 Inst. 83).

PAGE

Quando plus fit quàm fieri debet, videtur etiam illud fieri quod faciendum est 170

Quæ ab initio inutilis fuit institutio, ex post facto convalescere non potest (D. 50. 17. 210).

Quæ accessionum locum obtinent extinguuntur cùm principales res peremptæ fuerint 463

Quæ dubitationis tollendæ causâ contractibus inseruntur, jus commune non lædunt (D. 50. 17. 81).

Quæ in curiâ regis acta sunt ritè agi præsumuntur (3 Bulstr. 43).

Quæ in testamento ita sunt scripta, ut intelligi non possint, perinde sunt ac si scripta non essent (D. 50. 17. 73. § 3).

Quæ legi communi derogant strictè interpretantur (Jenk. Cent. 29).

Quælibet concessio fortissime contra donatorem interpretanda est (Co. Litt. 183. a).

Quæ non valeant singula juncta juvant 542

Quicquid demonstratæ rei additur satis demonstratæ frustra est . . 584

Quicquid plantatur solo solo cedit . 376

Quicquid solvitur, solvitur secundum modum solventis ; quicquid recipitur, recipitur secundum modum recipientis 770

Qui cum alio contrahit, vel est, vel debet esse non ignarus conditionis ejus (D. 50. 17. 19).

Qui doit inheriter al père doit inheriter al fitz 482

Qui ex damnato coitu nascuntur inter liberos non computentur . . 483

Qui facit per alium facit per se . 799

Qui hæret in literâ hæret in cortice . 641

PAGE

Qui in jus dominiumve alterius succedit jure ejus uti debet . 441, 444

Qui jure suo utitur neminem lædit . 362

Qui jussu judicis aliquod fecerit non videtur dolo malo fecisse, quia parere necesse est 88

Quilibet potest renunciare juri pro se introducto 655, 660

Qui non habet in ære luat in corpore (2 Inst. 172).

Qui non prohibet quod prohibere potest assentire videtur (2 Inst. 305) (*a*).

Qui per alium facit per seipsum facere videtur 777

Qui prior est tempore, potior est jure 335, 338

Qui rationem in omnibus quærunt rationem subvertunt . . . 151

Qui sentit commodum sentire debet et onus 667

Qui sentit onus sentire debet et commodum 666

Qui tacet consentire videtur . 134, 746

Qui vult decipi decipiatur . 738 (d)

Quod à quoquo pœnæ nomine exactum est id eidem restituere nemo cogitur (D. 50. 17. 46).

Quod ab initio non valet in tractu temporis non convalescit . . . 171

Quod ædificatur in areâ legatâ cedit legato 396

Quod contra legem fit pro infecto habetur (G. 405).

Quod contra rationem juris receptum est, non est producendum ad consequentias (D. 50. 17. 141) (*b*).

Quod fieri debet facile præsumitur (H. 153).

Quod fieri non debet factum valet 175, 289

(*a*) Cited *per* Parke, B., *Morgan* v. *Thomas*, 8 Exch. 304.

(*b*) See *Louisville R. C.* v. *Litson*, 2 Howard (U.S.), R. 523.

	PAGE
Quod meum est sine facto meo vel defectu meo amitti vel in alium transferri non potest	434
Quod non apparet non est.	156
Quod non habet principium non habet finem	174
Quod nullius est, est domini regis	336
Quod nullius est id ratione naturali occupanti conceditur	335
Quod remedio destituitur ipsâ re valet si culpa absit	206
Quod semel aut bis existit prætereunt legislatores	39
Quod semel meum est amplius meum esse non potest	434 (x)
Quod subintelligitur non deest (2 Ld. Raym. 832).	
Quod verò contra rationem juris receptum est, non est producendum ad consequentias	152
Quotiens dubia interpretatio libertatis est, secundum libertatem respondendum est (D. 50. 17. 20).	
Quotiens idem sermo duas sententias exprimit: ea potissimum excipiatur, quæ rei generandæ aptior est (D. 50. 17. 67).	
Quoties in stipulationibus ambigua oratio est, commodissimum est id accipi quo res de quâ agitur in tuto sit (D. 41. 1. 80, and 50. 16. 219).	
Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est	573
Quum principalis causa non consistit ne ea quidem quæ sequuntur locum habent.	463
RATIHABITIO mandato comparatur	822

	PAGE
Receditur a placitis juris potius quàm injuriæ et delicta maneant impunita	9
Regula est, juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere	247
Remoto impedimento emergit actio (W. 20).	
Res accessoria sequitur rem principalem	457
Res inter alios acta alteri nocere non debet	908
Res ipsa loquitur	298
Res judicata pro veritate accipitur	317, 320
Resoluto jure concedentis resolvitur jus concessum	436
Res perit suo domino	234
Respondeat superior	798
Res sua nemini servit (*a*).	
Rex non debet esse sub homine sed sub Deo et lege	40, 110
Rex non potest fallere nec falli (G. 438).	
Rex non potest peccare	46
Rex nunquam moritur	43
Roy n'est lié per ascun statute, si il ne soit expressement nosmé	68
SALUS populi suprema lex	1, 179 (e)
Salus reipublicæ suprema lex	348
Scientia utrinque par pares contrahentes facit.	750 (a)
Secundum naturam est, commoda cujusque rei eum sequi, quem sequuntur incommoda (D. 50. 17. 10).	
Seisina facit stipitem	489
Semper in dubiis benigniora præferenda (*b*).	
Semper in obscuris, quod minimum est sequimur	643 (b)

(*a*) Cited *per* Lord Wensleydale, *Baird* v. *Fortune*, 4 Macq. Sc. App. Cas. 151.

(*b*) See *Ditcher* v. *Denison*, 11 Moo. P. C. C. 343.

	PAGE
Semper præsumitur pro negante (*a*).	
Semper specialia generalibus insunt (D. 50. 17. 147).	
Sententia contra matrimonium nunquam transit in rem judicatum (7 Rep. 43).	
Sententia interlocutoria revocari potest definitiva non potest (Bac. Max. reg. 20).	
Sic utere tuo ut alienum non lædas .	218, 347, 375
Simplex commendatio non obligat .	737
Si quidem in nomine, cognomine, prænomine legatarii testator erraverit, cum de personâ constat, nihilominus valet legatum . . .	599
Si quid universitati debetur singulis non debetur nec quod debet universitas singuli debent (D. 3. 4. 7. 1 (*b*)).	
Sive tota res evincatur, sive pars, habet regressum emptor in venditorem	723
Socii mei socius, meus socius non est (D. 50. 17. 47).	
Solutio pretii emptionis loco habetur (Jenk. Cent. 56).	
Specialia generalibus derogant (*c*).	
Spoliatus debet ante omnia restitui (2 Inst. 714) (*d*).	
Stabit præsumptio donec probetur in contrarium	903
Statutum affirmativum non derogat communi legi (Jenk. Cent. 24).	
Sublato principali tollitur adjunctum	173 (u)
Summa ratio est quæ pro religione facit	14
Summum jus, summa injuria (Hob. 125) (G. 464).	
Super falso et certo frigitur . .	125
Surplusagium non nocet . . .	581
TALIS interpretatio semper fienda est, ut evitetur absurdum et inconveniens, et ne judicium sit illusorium (1 Rep. 52).	
Tenor est qui legem dat feudo . .	430
Traditio loqui facit chartam (5 Rep. 1) (*e*).	
Tutius semper est errare in acquitando quàm in puniendo, ex parte misericordiæ, quàm ex parte justitiæ .	316
UBI aliquid conceditur, conceditur et id sine quo res ipsa esse non potest	449
Ubi cessat remedium ordinarium ibi decurritur ad extraordinarium et nunquam decurritur ad extraordinarium ubi valetordinarium (G. 491).	
Ubi damna dantur, victus victori in expensis condemnari debet (2 Inst. 289) (*f*).	

(*a*) See *Reg.* v. *Millis*, 10 Cl. & Fin. 534 (cited *post*), where this maxim was applied; *A.-G.* v. *Dean, &c., of Windsor*, 8 H. L. Cas. 392; *Baker* v. *Lee, Id.* 512; *Beamish* v. *Beamish*, 9 H. L. Cas. 274, 338; *per* Lord Campbell, C. J., *Dansey* v. *Richardson*, 3 E. & B. 723.

(*b*) See 1 Bla. Com., 21st ed., 484.

(*c*) See *Kidston* v. *Empire Ins. Co.*, L. R. 1 C. P. 546; *Earl of Kintore* v. *Lord Inverury*, 4 Macq. Sc. App. Cas. 522.

(*d*) See 4 Bla. Com., 21st ed., 363; *Horwood* v. *Smith*, 2 T. R. 753.

(*e*) See as to this maxim, *Goddard's case*, 2 Rep. 4; *per* Bayley, J., *Styles* v. *Wardle*, 4 B. & C. 911; *per* Patteson, J., *Browne* v. *Burton*, 17 L. J., Q. B., 50; citing *Clayton's case*, 5 Rep. 1, and recognising *Steele* v. *Mart*, 4 B. & C. 272, 279; *Tupper* v. *Foulkes*, 6 C. B., N. S., 797. See, also, *Shaw* v. *Kay*, 1 Exch. 412; *per* Jervis, C. J., *Davis* v. *Jones*, 17 C. B. 634; *Cumberlege* v. *Lawson*, 1 C. B., N. S., 709, 720; *Xenos* v. *Wickham*, 14 C. B., N. S., 435; *S. C.*, 13 *Id.* 385, L. R. 2 H. L. 296; *Kidner* v. *Keith*, 15 C. B., N. S., 35.

(*f*) 3 Bla. Com., 21st ed., 399; cited *per* Tindal, C. J., 1 Bing., N. C., 522. This maxim is taken from the Roman law, see C. 3. 1. 13. § 6.

PAGE

Ubi eadem est ratio eadem est lex . 149
Ubi eadem ratio ibi idem jus . . 147
Ubi jus ibi remedium 181, 182, 184, 196
Ubi nullum matrimonium ibi nulla dos (Co. Litt. 32).
Ubi verba conjuncta non sunt sufficit alterutrum esse factum (D. 50. 17. 110. § 3).
Unumquodque dissolvitur eodem ligamine quo ligatur . . . 832
Unumquodque eodem modo quo colligatum est dissolvitur . . . 836
Usucapio constituta est ut aliquis litium finis esset . . . 846 (k)
Utile per inutile non vitiatur . . 581
Uxor non est sui juris sed sub potestate viri (3 Inst. 108).

Vani timores sunt æstimandi qui non cadunt in constantem virum (7 Rep. 27).
Verba accipienda sunt secundum subjectam materiem (6 Rep. 62).
Verba chartarum fortius accipiuntur contra proferentem . . . 548
Verba cum effectu accipienda sunt (Bac. Max. reg. 3).

PAGE

Verba generalia restringuntur ad habilitatem rei vel personam . . 600
Verba illata inesse videntur . 630, 631
Verba ita sunt intelligenda ut res magis valeat quàm pereat (Bac. Max. reg. 3).
Verba posteriora propter certitudinem addita ad priora quæ certitudine indigent sunt referenda . . . 540
Verba relata hoc maxime operantur per referentiam ut in eis inesse videntur 628
Veritas nominis tollit errorem demonstrationis 596
Via trita via tuta 130
Vicarius non habet vicarium . . 794
Vigilantibus et non dormientibus jura subveniunt 844
Volenti non fit injuria . 262, 263 (z)
Voluntas donatoris, in chartâ doni sui manifestè expressa, observetur (Co. Litt. 21. a).
Voluntas facit quod in testamento scriptum valeat (D. 30. 1. 12. § 3).
Voluntas testatoris est ambulatoria usque ad extremum vitæ exitum (4 Rep. 61 b).
Vox emissa volat—litera scripta manet 623

TABLE OF CASES.

A.

ABBOTT *v.* Middleton, 524, 549
Ablert *v.* Pritchard, 22
Abley *v.* Dale, 89, 108
Abraham *v.* Reynolds, 814
Abrath *r.* N. E. R. C. 101
Abrey *r.* Crux, 838
Acebol *r.* Levy, 572
Acey *v.* Fernie, 782
Ackerley *r.* Parkinson, 83
Ackroyd *v.* Smith, 432
Acton *r.* Blundell, 189, 337, 360
Adams *r.* Andrews, 840
—— *r.* Broughton, 324
—— *r.* Lancashire and Yorkshire R. C., 262
—— *r.* Lloyd, 923
—— *r.* Royal Mail Steam Packet Co., 240
—— *r.* Steer, 502
—— *v.* Wordley, 838
Adamson *v.* Jarvis, 745, 759
Addison *v.* Gandasequi, 781
Affleck *v.* Child, 312
Aga Kurboolie Mahomed *v.* The Queen, 411
Agacio *v.* Forbes, 781
Agar *v.* Athenæum Life Ass. Soc., 606
Agnew *r.* Jobson, 91
Agricultural Cattle Insurance Co. *r.* Fitzgerald, 148
Aiken *r.* Short, 77, 252, 758
Ainsworth *v.* Creeke, 828
Aislabie *r.* Rice, 233
Aitkenhead *v.* Blades, 294
Albert *v.* Grosvenor Investment Co., 835
Albon *r.* Pike, 620
Albrecht *v.* Sussman, 73
Alcock (*ex pte.*), 133
—— *v.* Cooke, 49, 60
Alder *v.* Boyle, 552
Alderman *v.* Neate, 504
Alderson *v.* Davenport, 793
Aldis *v.* Mason, 581
Aldous *v.* Cornwell, 148
Aldred's case, 362
Aldred *v.* Constable, 342
Aldridge *v.* Great Western R. C., 349
—— *r.* Johnson, 279
Alexander *r.* Alexander, 513
—— *r.* Vanderzee, 99
Alhambra (The), 574, 878
Alhusen *v.* Labouchere, 924
Allan, *app.*, Waterhouse, *resp.*, 795
—— *v.* Lake, 738
Allaway *v.* Wagstaff, 187, 371
Allen, *app.*, House, *resp.*, 582
—— *r.* Dundas, 318, 912
—— *v.* Edmundson, 658
—— *r.* Hayward, 828
—— *v.* Hopkins, 760
—— *v.* Maddock, 632
—— *v.* Milner, 326
—— *v.* Pink, 838
—— *v.* Rescous, 687
—— *v.* Richardson, 731
—— *r.* Worthy, 333
Alleyne *v.* Reg., 122
Allsop *v.* Allsop, 199
Allum *v.* Boultbee, 138
Allwood *v.* Heywood, 459
Alner *v.* George, 18
Alsager *v.* Close, 97
Alston *v.* Grant, 362
—— *v.* Herring, 218, 370

Alston *v.* Scales, 6
Altham's case, 97
Alton Woods (The case of), 48, 60
—— *r.* Midland R. C., 706, 745
Amalia (The), 609
Amann *v.* Damm, 312
Ambergate, Nottingham, and Boston R. C. *v.* Midland R. C., 293
Ambrose *v.* Kerrison, 494
Ames *v.* Waterlow, 274
Amies *v.* Stevens, 234
Amos *v.* Smith, 695
Ancona *v.* Marks, 825
Anderson *v.* Fitzgerald, 552
—— *v.* Lanerwille, 485
—— *v.* Radcliff, 342, 689
—— *v.* Thornton, 950
Andree *v.* Fletcher, 674
Andrew *v.* Motley, 466
Andrews *v.* Elliott, 131, 161
—— *v.* Laurence, 148
—— *v.* Marris, 83, 88
Anglo-Egyptian Co. *v.* Rennie, 230
Annesley *v.* Anglesea (Earl of), 894
Anon., Aleyn, 124
—— 1 Lev., 123
—— Lofft., 442
—— 2 Falk., 132
—— 1 Salk., 110
Ansdell *v.* Ansdell, 32
Anstee *v.* Nelms, 592
Anthony *v.* Haney, 296
Appleby *v.* Myers, 231, 234
Apps *v.* Day, 138
Archer *v.* James, 528
Arden *v.* Goodacre, 192, 289
Arkwright *v.* Gell, 359
Arlington *v.* Merrick, 601
Armory *v.* Delamirie, 337, 893
Armstrong's Trusts (*re*), 464
Armstrong *v.* Armstrong, 692
—— *v.* Burnett, 665
—— *v.* Normandy, 908
—— *v.* Stokes, 779
Arnold *v.* Holbrook, 3
Arthur *v.* Barton, 792
Ash *v.* Abdy, 527
— *v.* Daunay, 294
Ashby *v.* White, 139, 147, 182, 184, 185, 192
Asher *v.* Whitlock, 668
Ashford *v.* Thornton, 833
Ashforth *v.* Redford, 99
Ashley *v.* Harrison, 200
Ashlin *v.* White, 748
Ashmead *v.* Ranger, 448
Ashmole *v.* Wainwright, 76, 267
Ashton *v.* Poynter, 24
—— *v.* Sherman, 782
Ashworth, *app.*, Heyworth, *resp.*, 457
Aspden *v.* Seddon, 662
Aspdin *v.* Austin, 504, 608
Assop *v.* Yates, 199, 350, 810
Astley *v.* Reynolds, 168, 269
Aston *v.* Heaven, 234
Atherley *v.* Harvey, 924
Atkins *v.* Banwell, 708, 714
—— *v.* Hill, 715
—— *v.* Kilby, 92
Atkinson *v.* Denby, 250, 267, 673
—— *v.* Fell, 620
—— *v.* Newcastle Waterworks, 199
—— *v.* Pocock, 755
—— *v.* Ritchie, 240
—— *v.* Stephens, 720
Atkyns *v.* Kinnier, 302
Att.-Gen. *v.* Bovet, 456
—— *v.* Bradbury, 527
—— *v.* Brazen Nose Coll., 883
—— *v.* Bristol Waterworks Co., 31
—— *v.* Bristow, 62
—— *v.* Chelsea Waterworks Co., 27, 539
—— *v.* Clerc, 582
—— *v.* Donaldson, 68
—— *v.* Drummond, 883, 884
—— *v.* Ewelme Hospital, 277
—— *v.* Forster, 638
—— *v.* Hertford (Marquis of), 31
—— *v.* Hollingworth, 674, 680, 681
—— *v.* Jackson, 38
—— *v.* Köhler, 45

Att.-Gen. *v.* Lockwood, 3, 25, 301, 532
—— *v.* Marlborough (Duke of), 178
—— *v.* Mathias, 872, 874
—— *v.* Moore, 25
—— *v.* Parker, 638, 884
—— *v.* Physicians (The Coll. of), 262
—— *v.* Radloff, 70
—— *v.* Rogers, 104
—— *v.* Rudloff, 928
—— *v.* Shillibeer, 636
—— *v.* Sillem, 30, 104, 528, 301, 620, 639
—— *v.* Trueman, 67
—— *v.* Walmsley, 67
—— *v.* Windsor (Dean, &c., of), 321, 893
Attack *v.* Bramwell, 294, 408
Attenborough (*re*), 444
Attwood *v.* Small, 609, 690, 729, 743
Auchterarder (Presbytery of) *v.* Kinnoul (Lord), 282
Aulton *v.* Atkins, 210
Austin *v.* Chambers, 378
—— *v.* Great Western R. C., 387
—— *v.* Holmes, 142
Avery *v.* Bowden, 240, 244, 898,
—— *v.* Cheslyn, 393, 398
Aveson *v.* Kinnaird (Lord), 921
Awde *v.* Dixon, 438
Ayles *v.* Cox, 730
Ayrton *v.* Abbott, 83
Azémar *v.* Casella, 618

B.

Babcock *v.* Lawson, 439
—— *v.* Montgomery County Mutual Insurance Co., 211
Backhouse *v.* Bonomi, 187, 353, 853
Bacon *v.* Smith, 865
Badely *v.* Vigors, 329
Bagg's case, 107
Baggett *v.* Meux, 425, 426
Bagnall *v.* London and North Western R. C., 348, 351
Bagot (Lord) *v.* Williams, 318
Bagshaw *v.* Goward, 294
Bagueley *v.* Hawley, 758
Baildon *v.* Walton, 772
Bailey *v.* Bidwell, 710
—— *v.* De Crespigny, 230, 435
—— *v.* Edwards, 660
—— *v.* Harris, 694
—— *v.* Porter, 658
—— *v.* Stephens, 432, 876
Bain *v.* Fothergill, 137, 144
—— *v.* Whitehaven and Furness Junction R. C., 485
Bainbridge *v.* Lax, 842
—— *v.* Wells, 576
Baines *v.* Ewing, 787, 874
—— *v.* Holland, 601
—— *v.* Swainson, 763
Baird *v.* Fortune, 576, 855
—— *v.* Williamson, 189, 354, 355
Baker (*re*), 330
—— *v.* Bolton, 868
—— *v.* Cave, 797, 906
—— *v.* Jubber, 149
—— *v.* Tucker, 499
Balfe *v.* West, 701
Balmain *v.* Shore, 428
Ball (*ex pte.*) *re* Shepherds, 204, 757, 868
Bamberger *v.* Commercial Credit Mutual Ass. Soc., 148
Bamford *v.* Turnley, 362
Bandon (Earl of) *v.* Beecher, 317
Bandy *v.* Cartwright, 726, 757
Bane *v.* Methven, 453
Bank of British North America *v.* Cuvillier, 600
—— of England *v.* Anderson, 639
—— of Louisiana *v.* First National Bank of New Orleans, 286
—— of New South Wales *v.* Ouston, 803
Bankart *v.* Bowers, 722
Banks *v.* Newton, 287
Banner *v.* Berridge, 98
Bannerman *v.* White, 747
Banwen Iron Company *v.* Barnett, 175
Barber *v.* Brown, 251, 713

Barber *v.* Butcher, 580
—— *v.* Lesiter, 199
—— *v.* Pott, 268, 781
Barclay (*ex pte.*), 897
Baring *v.* Christie, 637
—— *v.* Corrie, 761
Barker (*re*), 631
—— *v.* Allan, 629
—— *v.* Cox, 730
—— *v.* Green, 181
—— *v.* Greenwood, 778
—— *v.* Highley, 792
—— *v.* Midland R. C., 195
—— *v.* St. Quintin, 834
—— *v.* Stead, 788
—— *v.* Windle, 747
Barkworth *v.* Ellerman, 707
—— *v.* Young, 232
Barley *v.* Walford, 754
Barnardiston *v.* Soame. 160, 202
Barnes *v.* Braithwaite, 77
—— *v.* Keane, 906
—— *v.* Lucas, 894
—— *v.* Ward, 264
Barnett *v.* Guilford (Earl of), 127
—— *v.* Lambert, 788
Barr *v.* Gibson, 734, 740
Barrett *v.* Bedford (Duke of), 647
—— *v.* Long, 314
—— *v.* Stockton and Darlington R. C., 557
Barrick *v.* Buba, 73
Barrington's case, 7
Barronet (*re*), 261
Barry *v.* Arnaud, 85
—— *v.* Croskey, 223
—— *v.* Robinson, 860
Bartholomew *v.* Bushnell, 736, 759
Bartlett *v.* Baker, 360
—— *v.* Crozier, 185
—— *v.* Kirwood, 107
—— *v.* Lewis, 924
—— *v.* Ramsden, 126
—— *v.* Rendle, 190
—— *v.* Smith, 102
—— *v.* Viner, 695
—— *v.* Wells, 310, 652
Barton *v.* Dawes, 584, 630
—— *v.* Fitzgerald, 533
Bartonshill Coal Co. *v.* M'Guire, 815
—— —— *v.* Reid, 811
Barwick *v.* English Joint Stock Bank, 752, 803
Baskerville's case, 63
Basley *v.* Bethune, 100
Bastable *v.* Poole, 781
Basten *v.* Carew, 84
Batard *v.* Hawes, 713
Bateman *v.* Bailey, 922
Baten's case, 372
Bates *v.* Hewitt, 750
—— *v.* Townley, 326
Bathurst (Borough of) *v.* Macpherson, 197
—— *v.* Errington, 524
Bath's (Earl of) case, 575
Battishill *v.* Reed, 372
Batty *v.* Marriott, 674
Baxendale *v.* Great Western R. C., 77, 557
Baxter, *app.*, Newman, *resp.*, 428
—— *v.* Burfield, 857
Bayley *v.* Merrel, 738
—— *v.* Manchester, &c., R. Co., 803
—— *v.* Wilkins, 453, 882
—— *v.* Wolverhampton Waterworks Co., 350, 366
Bayliffe *v.* Butterworth, 882
Baylis *v.* Att.-Gen., 562
—— *v.* Laurence, 101, 313
—— *v.* Le Gros, 506
—— *v.* Strickland, 84, 88
Bayne *v.* Walker, 228, 234
Bazeley *v.* Forder, 494
Beale *v.* Caddick, 771
—— *v.* Moules, 788
—— *v.* Sanders, 723
Bealey *v.* Stuart, 504, 722
Beamish *v.* Beamish, 176, 321, 468, 470, 471
Beard *v.* Egerton, 49, 346, 510
Beardman *v.* Wilson, 435
Beatson *v.* Skene, 312
Beauchamp *v.* Winn, 256
Beaudely *v.* Brook, 447
Beaudry *v.* Montreal (the Mayor of), 134
Beaufort (Duke of) *v.* Neeld, 729

Beaufort (Duke of) *v.* Swansea (Mayor of), 883, 884
Beaumont *v.* Barrett, 455
—— *v.* Brengeri, 18
—— *v.* Field, 588
—— *v.* Reeve, 708
Beaurain *v.* Scott, 83
Beavan *v.* Delahay, 388
Becher *v.* Great Eastern R. C., 706
Beck *v.* Rebow, 398
Beckett *v.* Midland R. C., 200
Beckh *v.* Page, 636
Beckham *v.* Drake, 856, 858
Bective *v.* Hodgson, 464
Bedford Infirmary (Governors of) *v.* Bedford (Commissioners of), 606
Beer *v.* Beer, 505
Beer, *app.*, Santer, *resp.*, 636
—— *v.* Walker, 742
Beere *v.* Foakes, 703, 843
Beeston *v.* Weate, 189
Begbie *v.* Levi, 19
Behn *v.* Burness, 508, 734
—— *v.* Kemble, 747
Belcher *v.* Sambourne, 678
Beldon *v.* Campbell, 452
Belfour *v.* Weston, 228
Bell (*ex pte.*), 675
—— *v.* Gardiner, 149, 253
—— *v.* Graham, 470
—— *v.* Midland R. C., 246, 372
—— *v.* Morrison, 846
—— *v.* Simpson, 304
Bellamy *v.* Majoribanks, 879
Benett *v.* The Peninsular and Oriental Steam Boat Co., 118
Benham *v.* United Guarantee, &c., Co., 747
Benjamin *v.* Andrews, 764
—— *v.* Storr, 197
Bennett *v.* Bays, 798
—— *v.* Herring, 443
Bennison *v.* Cartwright, 364
Benson *v.* Paull, 649
Bentley (*ex pte.*), 397
Berdoe *v.* Spittle, 643
Beresford *v.* Geddes, 133
Bernardie *v.* Motteux, 912
Bermondsey (Vestry) *v.* Ramsey, 373
Berriman *v.* Peacock, 379
Berry *v.* Alderman, 672, 710
Berwick *v.* Andrews, 861
—— *v.* Horsfall, 97
—— (May. of) *v.* Oswald, 230, 240, 601
Besant *v.* Cross, 562
Bessell *v.* Wilson, 108, 109
Bessey *v.* Windham, 681
Beswick *v.* Swindels, 241
Betterbee *v.* Davis, 168
Betts *v.* Gibbins, 683
—— *v.* Menzies, 510
—— *v.* Walker, 629
Bevans *v.* Rees, 168
Bewick *v.* Wintfield, 379
Biccard *v.* Shepherd, 800
Bickerdike *v.* Bollman, 658
Bickerton *v.* Burrell, 288, 553
Biddulph *v.* Lees, 518
Biffin *v.* Yorke, 531
Bigge *v.* Parkinson, 617, 739, 742
Bignold *v.* Springfield, 643
Bilbie *v.* Lumley, 249, 250
Billiter *v.* Young, 697
Bingle (*re*), 150
Binnington *v.* Wallis, 708
Birch (*re*), 901
Bird *v.* Brown, 826, 827
—— *v.* Holbrooke, 262
—— *v.* Relph, 870
Birkenhead Docks (Trustees of) *v.* Birkenhead Dock Co., 23
Birkett *v.* Morris, 196
—— *v.* Whitehaven Junction R. C., 366
Birks, *app.*, Allison, *resp.*, 526
Birt *v.* Boutinez, 481
Bishop *v.* Curtis, 435
—— *v.* Elliott, 400, 402, 541
—— *v.* Pentland, 212
Bittlestone *v.* Cooper, 590
Bize *v.* Dickason, 250, 252, 256
Black *v.* Smith, 168
Blackett *v.* Bradley, 353, 876
—— *v.* Weir, 682
Blackham *v.* Pugh, 311
Blackwell *v.* England, 499
Blades *v.* Higgs, 297, 337, 413
Blagrave *v.* Bristol Waterworks Co., 190

Blaikie *v.* Steinbridge, 801
Blake's case, 834
Blake *v.* Foster, 177
Blakemore *v.* Bristol & Exeter R. C., 745
—— *v.* Glamorganshire Canal Co., 557, 558
Blakesley *v.* Whieldon, 449
Blamford *v.* Blamford, 513
Bland *v.* Crowley, 500
—— *v.* Ross, 800
Blayne *v.* Gold, 595
Blewett, *app.*, Jenkins, *resp.*, 874
Blight *v.* Page, 242
Block *v.* Bell, 553
Blofield *v.* Payne, 195
Bloodworth *v.* Gray, 310
Blow *v.* Russell, 168
Blowers *v.* Rackham, 86
Bloxsome *v.* Williams, 18
Bluck *v.* Siddaway, 707
Bluett *v.* Tregonning, 872
Blundell *v.* Gladstone, 589
Blyth *v.* Birmingham Waterworks Co., 202, 224, 350
—— *v.* Dennett, 166
Boast *v.* Firth, 230
Boden *v.* French, 572
—— *v.* Wright, 710
Bodenham *v.* Purchas, 774
Bodfield *v.* Padmore, 255
Bodger *v.* Arch, 695, 862
Boileau *v.* Rutlin, 326, 910, 913
Bolckow *v.* Seymour, 99
Bolingbroke *v.* Kerr, 857
Bolton *v.* Gladstone, 912
Bonaker *v.* Evans, 107
Bonar *v.* Macdonald, 660
Bond *v.* Gibson, 785
—— *v.* Hopkins, 279
—— *v.* Roslin, 503
Bonelli (*re goods of*), 892
Bonomi *v.* Blackhouse, 347
Boodle *v.* Campbell, 277
—— *v.* Davis, 31
Boorman *v.* Brown, 194
Boosey *v.* Purday, 138
Booth *v.* Alcock, 277
—— *v.* Bank of England, 456
—— *v.* Clive, 134
—— *v.* Kennard, 98, 344
Boraston *v.* Green, 389, 448
Borradaile *v.* Hunter, 501, 543, 603
Bos *v.* Helsham, 731
Bosanquet *v.* Dashwood, 269
—— *v.* Wray, 772
Bostock *v.* Hume, 778
—— *v.* North Staffordshire R. C., 620
Botten *v.* Tomlinson, 793
Bottomley's case, 500
Bottomley *v.* Hayward, 845
Boucicault *v.* Chatterton, 346
—— *v.* Delafield, 346
Boughton *v.* James, 522
Boulton *v.* Bull, 345
—— *v.* Crowther, 6
—— *v.* Jones, 553
Bourne *v.* Fosbrooke, 466
—— *v.* Gatliff, 879
—— *v.* Mason, 706
Bousfield *v.* Wilson, 635, 678, 690
Bovill *v.* Pimm, 98
Boville *v.* Wood, 130
Bowden *v.* Waithman, 793
Bowen *v.* Owen, 169, 627
Bower *v.* Hodges, 607
—— *v.* Peate, 807
Bowerbank *v.* Monteiro, 839
Bowes *v.* Foster, 681
—— *v.* Shand, 98, 764
Bowman *v.* Blythe, 300
—— *v.* Horsey, 618
Bowring *v.* Stevens, 738
Bowyer *v.* Cook, 372, 633
Boydell *v.* Drummond, 629
—— *v.* M'Michael, 397
Boyes *v.* Bluck, 534
Boyle *v.* Brandon, 199
—— *v.* Wiseman, 102, 923
Boyse *v.* Rossborough, 272
Brace *v.* Marlborough (Duchess of), 339
Bracewell *v.* Williams, 702
Bradbee *v.* London (Mayor, &c. of), 351, 352
Bradburne *v.* Botfield, 505
Bradbury *v.* Anderton, 613
—— *v.* Morgan, 859
Bradlaugh *v.* De Rin, 902
—— *v.* Evans, 923
Bradley *v.* Bardsley, 149
—— *v.* Benjamin, 231

Bradley *v.* Carr, 83
—— *v.* Cartwright, 520
—— *v.* James, 916
—— *v.* Pilots of Newcastle, 883
—— *v.* Warburg, 130
—— *v.* Washington Steam Packet Co., 567
Bladlie *v.* Maryland Insurance Co., 214
Bradshaw *v.* Beard, 444, 713
—— *v.* Lawson, 415
—— *v.* Tasker, 34
Brady *v.* Giles, 809
—— *v.* Todd, 453
Brain *v.* Harris, 629
—— *v.* Thomas, 199
Braithwaite *v.* Coleman, 895
—— *v.* Gardiner, 287
—— *v.* Skinner, 185
Bramston *v.* Colchester (Mayor of), 23
—— *v.* Robins, 250
Brandao *v.* Barnett, 648, 879
Brandon *v.* Brandon, 664
—— *v.* Robinson, 429
—— *v.* Scott, 164, 288
Branson *v.* Didsbury, 138
Brass *v.* Maitland, 194, 738
Braunstein *v.* Accidental Death Insurance Co., 552
Braye Peerage (The), 902
Breadalbane (Marquis of) *v.* Marquis of Chandos, 258
Brecknock Co. *v.* Pritchard, 229
Bree *v.* Holbech, 725, 855
Breese *v.* Owens, 451
Bremer *v.* Freeman, 485
Bremner *v.* Hull, 899
Brewer *v.* Jones, 707
—— *v.* Sparrow, 161
Brewster *v.* Kitchell, 230, 240
Briddon *v.* Gt. Northern R. C., 234
Bridgeman *v.* Green, 425
—— *v.* Holt, 110
Bridges *v.* Garrett, 747, 778
—— *v.* Hawkesworth, 337, 769
Bridgman *v.* Dean, 703
Bright *v.* Legerton, 919
Brighty *v.* Norton, 102
Brindson *v.* Allen, 658
Brinsmead *v.* Harrison, 324
Brisbane *v.* Dacres, 250, 252, 272
Bristol (Earl of) *v.* Wilsmore, 296, 686
Bristol & Exeter R. C. *v.* Garten, 636
Bristol & North Som. Co. (*re*), 239
Bristow *v.* Sequeville, 892
—— *v.* Whitmore, 663
British Columbia Saw Mill Co. *v.* Nettleship, 220
British Linen Co. *v.* Caledonian Insurance Co., 768
Brittain *v.* Lloyd, 712
—— *v.* Kinnaird, 83
Britton *v.* Cole, 798
—— *v.* Gt. Western Cotton Co., 815
Broadbent *v.* Imperial Gas Co., 192
—— *v.* Ramsbotham, 189, 350
—— *v.* Wilkes, 872
Brogden *v.* Marriott, 243
Bromage *v.* Lloyd, 543
—— *v.* Vaughan, 157
Bromley *v.* Holland, 250
Brook (*re*), 106, 107, 109
—— *v.* Hook, 827
—— *v.* Jenney, 373
Brooke *v.* Brooke, 468, 469, 478
Brookes *v.* Tichbourne, 888
Brooks *v.* Bockett, 34
—— *v.* Hodgkinson, 122
—— *v.* Rivers (the Earl of), 110
Broom *v.* Batchelor, 498, 508
Broomfield *v.* Kirber, 154
Broughton *v.* Conway, 535
Brown *v.* Annandale, 344
—— *v.* Bussell, 816
—— *v.* Byrne, 620
—— *v.* Chapman, 121
—— *v.* Copley, 83, 805
—— *v.* Edgington, 739, 741
—— *v.* Fletcher, 643
—— *v.* Glenn, 408, 410
—— *v.* Hodgson, 780
—— *v.* Howard, 855
—— *v.* Jones, 88
—— *v.* Langley, 839
—— *v.* London (Mayor of), 238
—— *v.* Manchester S. & L. Ry., 265
—— *v.* Mallett, 360

Brown *v.* Robins, 187
—— *v.* Royal Insurance Co., 229, 244
—— *v.* Windsor, 351
Browne *v.* Lee, 713
Browning *v.* Dann, 409
—— *v.* Morris, 674
Brownlie *v.* Campbell, 137
Brownlow *v.* Metropolitan Board of Works, 818
Brudenell *v.* Elwes, 521
Bruff *v.* Conybeare, 567
Brune *v.* Thompson, 883
Brunswick (Duke of) *v.* Harmer, 853
—— *v.* Slowman, 408, 631
Brunton *v.* Hawkes, 49
Bryan *v.* Clay, 870
Bryant *v.* Beattie, 241
—— *v.* Busk, 234
—— *v.* Foot, 876, 903
—— *v.* Lefever, 189
—— *v.* Wardell, 445, 636
Bryden *v.* Stewart, 813
Brydges *v.* Phillips, 612
—— *v.* Smith, 117
Buccleuch (Duke of) *v.* Metropolitan Board of Works, 4
Buckby *v.* Coles, 447
Buckhurst's (Lord) case, 459
Buckhurst Peerage, 48
Buckhurst (The), 227
Buckland *v.* Butterfield, 400
—— *v.* Johnson, 322, 324
Buckley *v.* Barber, 427
—— *v.* Gross, 337, 769
Buckmaster, *app.*, Reynolds, *resp.*, 300
—— *v.* Meiklejohn, 326
—— *v.* Russell, 98
Budd *v.* Fairmaner, 615, 738
Buddle *v.* Green, 760
Bull *v.* Robinson, 739
Bullen *v.* Denning, 550
—— *v.* Sharp, 667, 785
Buller *v.* Mountgarret, 897
Bullock *v.* Richardson, 924
Bulwer *v.* Bulwer, 384
Bunbury *v.* Hewson, 870
Bunch *v.* Kennington, 273
Burbidge *v.* Morris, 789
Burchell *v.* Hickisson, 264
Burchfield *v.* Moore, 148
Burdan *v.* Greenwood, 80
Burder *v.* Veley, 4
Burdett *v.* Abbott, 407
Burgess *v.* Boetefeur, 330
—— *v.* Bracher, 546
—— *v.* Gray, 809
Burgh *v.* Legge, 758
Burling *v.* Read, 413
Burmester *v.* Norris, 792
Burn *v.* Carvalho, 34
Burns *v.* Chapman, 119
Burnand *v.* Rodoconachi, 165
Burnard, *app.*, Haggis, *resp.*, 310
Burnby *v.* Bollett, 742
Burnside *v.* Dayrell, 788
Buron *v.* Denman, 821, 831
Burrage *v.* Nicholetts, 295
Burrows *v.* March Gas Co., 199, 201
Burt *v.* Haslett, 400, 541
Burton *v.* Griffiths, 102
—— *v.* Reevell, 503
—— *v.* Thompson, 138
Bush *v.* Martin, 714, 850
Bushell's case, 81, 96, 101
Busher, *app.*, Thompson, *resp.*, 872
Busk *v.* R. E. A. Co., 212
Butcher *v.* Butcher, 413
—— *v.* Henderson, 26
Bute (Marquis of) *v.* Thompson, 240
Butler *v.* Kent, 199
—— *v.* Knight, 193
Butter and Baker's case, 127
Butterfeilds *v.* Burroughs, 737
Button *v.* Thompson, 613
Bwlch-y-Plwm Lead Mining Co. *v.* Baynes, 697
Byam *v.* Bullard, 262
Byrne *v.* Manning, 158

C.

Cadaval (Duke de) *v.* Collins, 271, 272
Cadell *v.* Palmer, 135, 423, 424
Cadge (*in the goods of*), 150

Cage *v.* Acton, 120, 129
—— *v.* Paxton, 535
Caine *v.* Horsfall, 881
Caines *v.* Smith, 723
Calcutta and Burmah Steam Navigation Co. *v.* De Mattos, 649
Caldecott *v.* Smythies, 389
Calder *v.* Halket, 81
Calder and Hebble Navigation Co. *v.* Pilling, 20, 451
Caledonian R. Co. *v.* Colt, 620
—— *v.* Cort, 185
—— *v.* Lockhart, 656
—— *v.* North British R. Co., 531
—— *v.* Sprot, 187, 445
—— *v.* Walker's trustees, 5
Callaghan *v.* Callaghan, 681
Calland *v.* Troward, 120
Callisher *v.* Bischoffheim, 704
Calvert *v.* Baker, 150
Calvin's case, 72, 74
Camberwell Rent-charge (*re*), 107
Cambridge *v.* Rous, 584
Cameron *v.* Charing Cross R. Co., 200
Camidge *v.* Allenby, 845
Cammell *v.* Sewell, 912
Camoys (Lord) *v.* Blundell, 589, 592
Campbell *v.* Campbell, 137, 682
—— *v.* Fleming, 697
—— *v.* Loader, 328
—— *v.* Rickards, 889
—— *v.* Spottiswoode, 313
—— *v.* Strangeways, 138
—— *v.* Webster, 613
Canadian Prisoners' case, 94
Candler *v.* Candler, 892
Canham *v.* Barry, 230, 232, 668, 686
Cann *v.* Clipperton, 93
Cannam *v.* Farmer, 287, 652
Cannan *v.* Reynolds, 328
Cannot *v.* Morgan, 330
Canterbury (Visc.) *v.* Att.-Gen., 43, 55, 203, 228, 366, 820, 866
Canterbury's (Archb. of) case, 606
Capel *v.* Child, 107
—— *v.* Powell, 869
Capital and Counties Bank *v.* Henty, 314
Card *v.* Case, 368
Cardigan (Earl of) *v.* Armitage, 376, 450
Carew *v.* Duckworth, 658
Cargey *v.* Aitcheson, 580
Carlyon *v.* Lovering, 872
Carmac *v.* Warriner, 736, 739
Carman *v.* Reynolds, 256
Carmichael *v.* Carmichael, 274
Carr *v.* Hood, 313
—— *v.* Jackson, 553
—— *v.* L. & N. W. R. Co., 284
—— *v.* Martinson, 168
—— *v.* Montefiore, 512, 750
—— *v.* Roberts, 856
—— *v.* Royal Exchange Ass. Co., 529
—— *v.* Stephens, 329
Carratt *v.* Morley, 83, 88, 89
Carron Co. *v.* Hunter, 691
Carter *v.* Boehm, 750, 889
—— *v.* Carter, 649
—— *v.* Crick, 736, 880
—— *v.* Flower, 658
—— *v.* James, 320, 326
—— *v.* Wormald, 842
Cartwright *v.* Green, 924
Casher *v.* Holmes, 606
Cashill *v.* Wright, 350
Castellani *v.* Thompson, 286
Castleden *v.* Castleden, 845
Castledon *v.* Turner, 562
Castrique *v.* Imrie, 912
Caswell, *app.*, Cook, *resp.*, 527
—— *v.* Worth, 262, 367
Catchpole *v.* Ambergate, &c., R. C., 183
Cates *v.* Knight, 620
Catherwood *v.* Caslon, 474
Catlin *v.* Bell, 795
Caton *v.* Caton, 840
Cattell *v.* Ireson, 928
Catterall *v.* Catterall, 470
—— *v.* Hindle, 96, 778
Catton *v.* Simpson, 148
Caudrey's case, 156
Cave *v.* Hastings, 630
—— *v.* Mills, 161
—— *v.* Mountain, 83
Central R. C. of Venezuela *v.* Kisch, 738, 743

Chadwick *v.* Marsden, 447
—— *v.* Trower, 352
Chamberlain *v.* The Chester and Birkenhead R. C., 198
—— *v.* Boyd, 200
—— *v.* King, 94
—— *v.* Williamson, 857
Chambers *v.* Bernasconi, 919
—— *v.* Mason, 202
—— *v.* Miller, 297
Chandelor *v.* Lopus, 737
Chandler (*in re*), 111
—— *v.* Doulton, 192
Chandos (Marquis of) *v.* Commissioners of Inland Revenue, 527
Chanel *v.* Robotham, 458
Chaney *v.* Payne, 582
Channon *v.* Patch, 380
Chanter *v.* Dewhurst, 739
—— *v.* Hopkins, 616, 734, 735, 739, 741
—— *v.* Leese, 242
Chapleo *v.* Brunswick Building Society, 784
Chapman *v.* Bluck, 638
—— *v.* Dalton, 642
—— *v.* Freston, 290
—— *v.* Pickersgill, 183
—— *v.* Rothwell, 366
—— *v.* Shepherd, 268, 882
—— *v.* Spiller, 758
—— *v.* Walton, 889
Chappell *v.* Purday, 30, 346
Chapple *v.* Cooper, 493
Charles River Bridge *v.* Warren Bridge, 449
Charleton *v.* Spencer, 534
Charlotta (The), 261
Charnley *v.* Winstanley, 278
Chartered Mer. Bk. of India *v.* Netherlands SS. Co., 216
Chasemore *v.* Richards, 189, 337, 347, 356, 360
—— *v.* Turner, 98
Chatfield *v.* Paxton, 253
Chatterton *v.* Cave, 138
Chauntler *v.* Robinson, 353
Cheesman *v.* Exall, 444, 760
Cheetham *v.* Ward, 659
Chelsea (Vestry of), *app.*, King, *resp.*, 5
Cheney *v.* Courtois, 498, 906
Chesman *v.* Nainby, 695
Chester *v.* Wortley, 924
Chesterfield, &c., Colliery Co. *v.* Hawkins, 504
Chevely *v.* Fuller, 98
Cheyney's case, 562, 567, 637
Chichester *v.* Lethbridge, 197
Chilton *v.* London and Croydon R. C., 451
Chod *v.* Tilsed, 883
Cholmondeley (Marq. of) *v.* Clinton (Lord), 338, 501, 534, 561
Chope *v.* Reynolds, 215
Chorlton *v.* Lings, 600
Chown *v.* Baylis, 205
Christchurch (Dean, &c., of) *v.* Buckingham (Duke of), 274
Christie *v.* Boulbee, 723
—— *v.* Gosling, 416, 424
Christopherson *v.* Burton, 13, 342
Chuck *v.* Cremer, 159
Church *v.* Mundy, 604
Churchill *v.* Churchill, 101
—— *v.* Siggers, 124, 190
Churchward *v.* Ford, 607
—— *v.* Reg., 55, 244, 505, 625
City Discount Co. *v.* McLean, 775
Clancy *v.* Piggott, 841
Clan Gordon (The), 24
Clarence Railway Company *v.* Great North of England Railway Company, 5, 449
Claridge's Patent (*in re*), 344
Clark *v.* Adie, 164, 311
—— *v.* Alexander, 463
—— *v.* Chambers, 201, 367
—— *v.* Woods, 91, 272
Clarke *v.* Bradlaugh, 25, 68, 70, 129, 138
—— *v.* Cogg, 376, 447
—— *v.* Colls, 519
—— *v.* Crofts, 857
—— *v.* Dixon, 255, 289, 686, 697
—— *v.* Holford, 399
—— *v.* Holmes, 814
—— *v.* Royston, 388, 619
—— *v.* Tinker, 154
—— *v.* Wright, 38
Clay *v.* Turley, 837

Claydon *v.* Green, 530
Clayton's case, 774
Clayton (*ex pte.*), 527
—— *v.* The Att.-Gen., 166
—— *v.* Corby, 876
—— *v.* Kynaston, 659
—— *v.* Lord Nugent, 563, 632
Clegg *v.* Dearden, 325
Clement *v.* Weaver, 78
Clements *v.* Scudamore, 338
Clere's case, 126
Cleveland *v.* Spier, 264, 362
Clift *v.* Schwabe, 509, 543, 577, 638
Clifton *v.* Cockburn, 249
—— *v.* Hooper, 192
Climie *v.* Wood, 395, 396, 397
Close *v.* Phipps, 268
Clothier *v.* Webster, 818
Clough *v.* Radcliffe, 684
Clow *v.* Brogden, 196
Clubb *v.* Hutson, 689
Clunnes *v.* Pezzey, 894
Cobb *v.* Becke, 707, 794
—— *v.* Mid-Wales R. C., 39
Cobbett *v.* Warner, 327
Cock *v.* Gent, 7
Cockburn *v.* Alexander, 555, 881
Cocker *v.* Tempest, 129
Cockerill *v.* Cholmeley, 258
Cocking *v.* Ward, 717
Cockram *v.* Irlam, 795
Cockrill *v.* Sparkes, 98
Cocks *v.* Nash, 834
Cocksedge *v.* Cocksedge, 263
Coddington *v.* Paleologo, 879
Codrington *v.* Codrington, 167
Coe *v.* Lawrance, 528
— *v.* Wise, 192
Coggs *v.* Bernard, 234
Colburn *v.* Patmore, 682, 685
Colchester (Mayor of) *v.* Brooke, 361
Cole *v.* Goble, 511
—— *v.* N. W. Bank, 763
Colegrave *v.* Dias Santos, 391, 395, 396
Coleman *v.* Riches, 820
Coles *v.* Hulme, 533, 534
—— *v.* Pack, 653
—— *v.* Trecothick, 795
Collen *v.* Wright, 750, 785
Collett *v.* Foster, 124, 190, 798, 830
Collingridge *v.* Royal Exchange Ins. Co., 196
Collingwood *v.* Berkeley, 788
Collins *v.* Aron, 78
—— *v.* Blantern, 79, 651, 687
—— *v.* Bristol and Exeter R.C., 234
—— *v.* Brook, 707
—— *v.* Cave, 199
—— *v.* Evans, 753
—— *v.* Middle Level Commissioners, 201, 355
Collis *v.* Selden, 745
Colman *v.* Eastern Counties Railway, 7
—— *v.* Foster, 441
Colmore *v.* Tyndall, 503
Columbine Insurance Co. *v.* Lawrence, 212
Colwill *v.* Reeves, 279
Commercial S. S. Co. *v.* Boulton, 138
Comyn *v.* Comyn, 263
Connelly *v.* Steer, 341
Conradi *v.* Conradi, 317
Constable *v.* Nicholson, 872, 876
Cook *v.* Clark, 412
—— *v.* Jennings, 242, 610, 613
—— *v.* Lister, 837
—— *v.* Palmer, 793
Cooke *v.* Birt, 412
—— *v.* Tauswell, 896
—— *v.* Tonkin, 789
—— *v.* Waring, 186, 368
—— *v.* Wildes, 314
—— *v.* Wilson, 288, 782
Coombes *v.* Dibble, 674
Coombs (*re*), 112
—— *v.* The Bristol and Exeter R. C., 778
—— case, 794
Cooms (*re*), 268
Coomer *v.* Latham, 89
Cooper *v.* Cooper, 167
—— *v.* Crabtree, 372
—— *v.* Harding, 547
—— *v.* Hubbock, 834
—— *v.* Johnson, 857
—— *v.* Law, 746
—— *v.* Parker, 703, 843
—— *v.* Phibbs, 247, 256

Cooper *v.* Reg., 57
—— *v.* Shepherd, 324
—— *v.* Simmons, 264, 857
—— *v.* Slade, 821
—— *v.* Walker, 611
—— *v.* Wandsworth Board of Works, 109
—— *v.* Willomatt, 445
—— *v.* Woolfitt, 386, 464
Cope *v.* Albinson, 716
—— *v.* Cope, 538
—— *v.* Rowlands, 694
Copeland (*ex pte.*), 640
Copeman *v.* Gallant, 529
Copland *v.* Laporte, 536
Copley *v.* Burton, 17
Corbet's case, 422
Corbet *v.* Hill, 373
Corcoran *v.* Gurney, 213
Cork and Bandon R. C. *v.* Goode, 848
Cornell *v.* McGorlish, 713
Corner *v.* Shew, 859
Cornfoot *v.* Fowke, 750
Cornforth *v.* Smithard, 98
Cornill *v.* Hudson, 851
—— *v.* Cleiff, 607
—— *v.* Keene, 344
Corry *v.* Burr, 215
Corsar *v.* Reed, 159
Cort *v.* Sagar, 447
Corturier *v.* Hastie, 881
Costar *v.* Hetherington, 332
Cotes *v.* Michil, 88
Cothay *v.* Fennel, 781
Cotterel *v.* Jones, 190
Couch *v.* Steel, 199, 813
Counden *v.* Clerke, 567
Courtauld *v.* Legh, 364
Courtenay *v.* Strong, 242
Courtney *v.* Taylor, 504
Couston *v.* Chapman, 735
Coventry *v.* Apsley, 853
Coverley *v.* Burrell, 738
Cowan *v.* Buccleuch (Duke of), 131
—— *v.* Milbourn, 208, 693
Coward *v.* Baddeley, 300
—— *v.* Gregory, 866
Cowell *v.* Edwards, 713
Cowie *v.* Barber, 674
Cowley *v.* Dunlop, 613
Cowper *v.* Godmond, 854
—— *v.* Green, 703
Cox *v.* Burbidge, 368
— *v.* Glue, 372
— *v.* Godsalve, 386
— *v.* Hickman, 785
— *v.* Hubbard, 288
— *v.* Lee, 310
— *v.* Leigh, 884
— *v.* London (Mayor of), 876
— *v.* Masterman, 255
— *v.* Midland Counties R. C., 781
— *v.* Mitchell, 332
— *v.* Morgan, 845
— *v.* Prentice, 670
Coxhead *v.* Richards, 311
Cracknell *v.* Thetford (The Mayor of), 192, 559
Craig *v.* Levy, 159
Crane *v.* London Dock Co., 764
—— *v.* Powell, 629
Crauston *v.* Marshall, 747
Craven *v.* Smith, 320
Craw *v.* Ramsay, 74
Crawcour *v.* Salter, 882
Crawshay *v.* Maule, 428
—— *v.* Thompson, 748
Crease *v.* Barrett, 917
Creighton *v.* Rankin, 660
Crepps *v.* Durden, 19
Crespigny *v.* Wittenoom, 529
Cripps *v.* Reade, 725
Crisp *v.* Anderson, 894
Critchley (*ex pte.*), 687
Croft *v.* Alison, 805, 809
—— *v.* Lumley, 457, 771
—— *v.* Stevens, 314
Crofts *v.* Beale, 709
—— *v.* Harris, 326
—— *v.* Waterhouse, 234
Croll *v.* Edge, 49
Crompton *v.* Lea, 355
Croockewit *v.* Fletcher, 150, 508
Crookenden *v.* Fuller, 485
Cropper *v.* Cook, 639, 874, 882
Cross *v.* Williams, 788
Crosse *v.* Gardner, 759
Crossfield *v.* Morrison, 602
—— *v.* Such, 427, 862, 865
Crossing *v.* Scudamore, 500
Crossley *v.* Dixon, 164

Crotty *v.* Hodges, 149
Crow *v.* Edwards, 131
—— *v.* Falk, 634
—— *v.* Rogers, 703
Crowder *v.* Long, 793
Crowhurst *v.* Amersham, 349
Crowther *v.* Farrer, 702
Cuckfield Burial Board (*re*), 69
Cuckson *v.* Stone, 231
Cullen *v.* Butler, 543
—— *v.* Thompson's Trustees, 783
Cumber *v.* Wane, 117, 843
Cumming *v.* Bedborough, 250, 267
—— *v.* Forrester, 49
—— *v.* Ince, 272
Cummins *v.* Heard, 326
Cumpston *v.* Haigh, 553
Cunard *v.* Hyde, 689
Cundell *v.* Dawson, 686, 694
Curlewis *v.* Clarke, 843
—— *v.* Laurie, 408
—— *v.* Lord Mornington, 855
Curzon *v.* Belworthy, 686
Curteis *v.* Kenrick, 466
Cutler *v.* Turner, 319
Cuthbert *v.* Cumming, 874
—— *v.* Haley, 688
Cuthbertson *v.* Irving, 177
Cutter *v.* Powell, 613, 618

D.

Dails *v.* Lloyd, 251
Dains *v.* Heath, 629
Dakins *v.* Seaman, 22
Dalby *v.* Hirst, 389, 874
Dale *v.* Humfrey, 620
Dalhousie (The Countess of) *v.* M'Dowall, 482
D'Allex *v.* Jones, 694
Dalmer *v.* Barnard, 153
Dalrymple *v.* Dalrymple, 468
Dalston *v.* Coatsworth, 893
Dalton *v.* Angus, 38, 137, 187, 807
Daly *v.* Thompson, 273
Dalyell *v.* Tyrer, 801, 809
Dand *v.* Kingscote, 450
Daniel *v.* Gracie, 579
—— *v.* Morton, 107
—— *v.* Sinclair, 257
Daniell *v.* Directors of Metropolitan R. C., 807
Daniels *v.* Fielding, 190
Danks (*ex pte.*), 168
Dansey *v.* Richardson, 350
Danube, &c., R. C. *v.* Xenos, 243
Danvers *v.* Morgan, 327
Darby *v.* Ouseley, 310
D'Arcy *v.* Tamar, 902
Darcy (Lord) *v.* Askwith, 379, 458
Darnley (Earl of) *v.* London, Chatham and Dover R. C., 132
Dart *v.* Dart, 75
Dartmouth (Mayor of) *v.* Silly, 240
Dash *v.* Van Kleeck, 28, 29
Dashwood *v.* Jermyn, 706
Davenport *v.* Mason, 954
Davidson *v.* Burnand, 543
—— *v.* Cooper, 148, 149, 150
—— *v.* Sinclair, 137
—— *v.* Stanley, 782
Davies *v.* Humphries, 713, 854
—— *v.* Jenkins, 124, 190
—— *v.* Lowndes, 282
—— *v. dem.* Lowndes *ten.*, 174, 910
—— *app.*, Hopkins, *resp.*, 794
—— *v.* Pearce, 917
—— *v.* Pratt, 899
—— *v.* Williams, 413
Davis *v.* Bomford, 839
—— *v.* Burrell, 413
—— *v.* Cary, 240
—— *v.* Eyton, 385
—— *v.* Haycock, 882
—— *v.* Jones, 402
—— *v.* Lloyd, 918
—— *v.* London and Blackwall R. C., 354
—— *v.* Meeker, 787
—— *v.* Nisbett, 703
—— *v.* Powell, 153
—— *v.* Serace, 635
—— *v.* Trevannion, 160

Davison *v.* Donaldson, 779
—— *v.* Duncan, 312
—— *v.* Gent, 654, 668
—— *v.* Wilson, 197, 413
Daw *v.* Metropolitan Board of Works, 24
Dawes *v.* Hawkins, 3
—— *v.* Peck, 780
Dawkins *v.* Lord Paulet, 190, 202, 203, 311
—— *v.* Lord Rokeby, 202, 203
Dawson *v.* Collis, 758
—— *v.* Fitzgerald, 696
—— *v.* Oliver Massey, 233, 241
—— *v.* Morrison, 791
—— *v.* Paver, 7
—— *v.* The Sheriffs of London, 199
—— *v.* Surveyors of Highways, 897
Day *v.* Savadge, 115
— *v.* Trig, 588
Deacon *v.* Gridley, 720
Dean *v.* James, 168
—— *v.* Millard, 25
Deane *v.* Clayton, 178, 362
Dearden *v.* Townsend, 304
Dearle *v.* Hall, 341
De Beauvoir *v.* De Beauvoir, 512
De Begnis *v.* Armistead, 695
De Bernardy *v.* Harding, 836
De Bode (Baron) *v.* Reg., 51, 57, 68, 203, 892
De Bussche *v.* Alt, 798
Debenham *v.* Mellon, 793
Deering *v.* Farrington, 607
Defreeze *v.* Trumper, 757
Degg *v.* Midland R. C., 264, 350, 815
De Lancey (*re*), 126
Delany *v.* Fox, 413
Delegal *v.* Highley, 100
De Medina *v.* Grove, 190, 272
De Mesnil *v.* Dakin, 272, 280
De Montmorency *v.* Devereux, 173
De Moranda *v.* Dunkin, 793
Dempster *v.* Purnell, 906
Denby *v.* Moore, 267
Denison *v.* Holliday, 374
—— *v.* Ralphson, 759
Denn *v.* Diamond, 527
Denn *d.* Nowell *v.* Roake, 558
Dennis *v.* Fovell, 226
Dent *v.* Auction Mart Co., 365
—— *v.* Smith, 215
Denton *v.* Great Northern R. C., 234
Depperman *v.* Hubbersty, 777
Derby (Earl of), case of, 110
—— *v.* Bury Commissioners, 900
De Roo *v.* Foster, 310
Des Barre *v.* Shey, 51
Deuters *v.* Townsend, 438
Devaux *v.* Conolly, 271, 670, 881
—— *v.* J'Anson, 543
De Vaux *v.* Salvador, 218
Devaynes *v.* Noble, 135, 775
Dew *v.* Parsons, 250
Dews *v.* Riley, 88
Dicas *v.* Lord Brougham, 82
Dickenson *v.* Grand Junction Canal Co., 189, 196
—— *v.* Jardine, 620, 881
—— *v.* Naul, 760, 761
Dickinson *v.* North Eastern R. C., 864
—— *v.* Stidolph, 632
Dickson *v.* Caledonian R. C., 38
—— *v.* Reg., 528
—— *v.* Swansea Vale R. C., 441
—— *v.* Zizinia, 614
Dietrichsen *v.* Giubilei, 713
Digby *v.* Thompson, 310
Dimes (*in re*), 111
—— *v.* Grand Junction R. C., 111
—— *v.* Petley, 361
Dimmock *v.* Bowley, 124
Dimeck *v.* Corlett, 509
Di Sora *v.* Phillips, 99, 892
Dixon *v.* Bell, 367
—— *v.* Bovill, 437, 438
—— *v.* Caledonian Co., 533
—— *v.* Clarke, 168
—— *v.* Holroyd, 847
—— *v.* Metropolitan Board of Works, 6, 225
—— *v.* Sadler, 800
—— *v.* Stansfeld, 648
—— *v.* Yates, 761

Dobell *v.* Stevens, 738, 746
Dobie *v.* Larkan, 710
Dobbs *v.* Grand Junction Water Works, 22
Dobson *v.* Blackmore, 197, 361
—— *v.* Espie, 837
Dodd *v.* Burchell, 447
—— *v.* Holme, 187, 351, 352
Dodgson *v.* Scott, 691
Doe *d.* Allen *v.* Allen, 569
—— Amlot *v.* Davies, 512
—— Anglesea (Lord) *v.* Rugeley (Churchwardens of), 240
—— Ashburnham (Earl of) *v.* Michael, 916
—— Ashforth *v.* Bower, 584, 597
—— Atkinson *v.* Fawcett, 604
—— Bacon *v.* Bridges, 910
—— Barney *v.* Adams, 502
—— Beach *v.* Jersey (Earl of) 671
—— Beech *v.* Nall, 637
—— Biddulph *v.* Poole, 654
—— Bills *v.* Hopkinson, 513
—— Birtwhistle *v.* Vardill, 482
—— Bish *v.* Keeling, 362
—— Blesard *v.* Simpson, 517
—— Blomfield *v.* Eyre, 434
—— Brammall *v.* Collinge, 172
—— Brayne *v.* Bather, 327
—— Bristol Hospital (Governors of) *v.* Norton, 179
—— Bryan *v.* Bancks, 173, 273
—— Bywater *v.* Brandling, 540
—— Bute *v.* Guest, 534
—— Cadogan *v.* Ewart, 153
—— Canon *v.* Rucastle, 605
—— Cape *v.* Walker, 518
—— Chichester *v.* Oxenden, 597
—— Cholmondeley (Earl of) *v.* Maxey, 631
—— Clarke *v.* Ludlam, 143
—— Compton *v.* Carpenter, 587
—— Cross *v.* Cross, 466
—— Curzon *v.* Edmonds, 98
—— Dand *v.* Thompson, 903
—— Daniell *v.* Woodroffe, 207, 502
—— Davies *v.* Williams, 551
—— Downe *v.* Thompson, 911
Doe *d.* Dunning *v.* Cranstoun, 588
—— Duntze *v.* Duntze, 317
—— Egremont (Earl of) *v.* Burrough, 434
—— Ellis *v.* Owens, 532
—— Everett *v.* Cooke, 545
—— Freeland *v.* Burt, 374, 571
—— Fryer *v.* Coombs, 97
—— Gains *v.* Rouse, 595
—— Gallini *v.* Gallini, 605
—— Gallop *v.* Vowles, 916
—— Gilbert *v.* Ross, 896
—— Gord *v.* Needs, 567, 568
—— Gore *v.* Needs, 567
—— —— *v.* Langton, 637
—— Grantley (Lord) *v.* Butcher, 240
—— Groves *v.* Groves, 285
—— Gutteridge *v.* Sowerby, 822
—— Gwillim *v.* Gwillim, 562
—— Hamilton *v.* Clift, 873
—— —— *v.* Huddard, 322
—— Harris *v.* Greathed, 590
—— Haw *v.* Earles, 545
—— Hemming *v.* Willetts, 570
—— Henry *v.* Gustard, 327
—— Hiscocks *v.* Hiscocks, 587, 588
—— Hopley *v.* Young, 849
—— Howell *v.* Thomas, 604
—— Hotchkiss *v.* Pearse, 612
—— Hubbard *v.* Hubbard, 585, 587
—— Hull *v.* Wood, 654
—— Hutchinson *v.* Manchester and Rossendale Railway Co., 559
—— Jenkins *v.* Davies, 888
—— Kinglake *v.* Beviss, 913
—— Levy *v.* Horne, 277
—— Lewis *v.* Davis, 501
—— Lloyd *v.* Ingleby, 609
—— Mansfield *v.* Peach, 612
—— Meyrick *v.* Meyrick, 533
—— Michinson *v.* Carter, 457, 653
—— Mudd *v.* Suckermore, 888
—— Murch *v.* Marchant, 539
—— Muston *v.* Gladwin, 277
—— Myatt *v.* St. Helen's R. C., 547
—— Nanney *v.* Gore, 904

Doe *d.* Norton *v.* Webster, 570, 571
—— Otley *v.* Manning, 702
—— Oxenden *v.* Chichester, 575
—— Padwick *v.* Skinner, 919
—— —— *v.* Witcombe, 919
—— Parsley *v.* Day, 504
—— Patteshall *v.* Turford, 919
—— Pearson *v.* Ries, 638
—— Pennington *v.* Taniere, 172
—— Phillips *v.* Evans, 899
—— Preedy *v.* Holtom, 570
—— Pulteney *v.* Freeman, 327
—— Renon *v.* Ashley, 590
—— Richards *v.* Lewis, 681
—— Roberts *v.* Roberts, 681
—— —— *v.* Parry, 588
—— Robertson *v.* Gardiner, 898
—— Rogers *v.* Price, 448, 504
—— —— *v.* Pullen, 614
—— —— *v.* Rogers, 857
—— Sams *v.* Garlick, 513, 516, 604
—— Scholefield *v.* Alexander, 626
—— Scott *v.* Roach, 513
—— Shallcross *v.* Palmer, 150, 901
—— Shore *v.* Porter, 861
—— Shrewsbury (Earl of) *v.* Wilson, 626
—— Smith *v.* Galloway, 584, 588
—— Spilsbury *v.* Burdett, 611
—— Stace *v.* Wheeler, 861
—— Stansbury *v.* Arkwright, 73
—— Stevens *v.* Lord, 406
—— Stevenson *v.* Glover, 513
—— Strickland *v.* Strickland, 98, 466
—— Strode *v.* Seaton, 327
—— Sweetland *v.* Webber, 915, 918
—— Tatum *v.* Catomore, 148, 150, 901
—— Thomas *v.* Acklam, 73
—— Thomas *v.* Benyon, 569
—— Timmis *v.* Steele, 579
—— Tofield *v.* Tofield, 171
—— Tremewen *v.* Permewen, 512
Doe *d.* Tyrrell *v.* Lyfford, 561
—— Watson *v.* Jefferson, 845
—— Watt *v.* Morris, 62
—— Westlake *v.* Westlake, 568
—— William the IVth *v.* Roberts, 62
—— Williams *v.* Lloyd, 681
—— —— *v.* Matthews, 170
—— Winter *v.* Perratt, 486, 487, 562, 567
—— Woodall *v.* Woodall, 632
—— Woodhouse *v.* Powell, 902
—— Wyndham *v.* Carew, 537, 643
Doe *v.* Acklam, 177
—— *v.* Allen, 144
—— *v.* Beviss, 884
—— *v.* Godwin, 535
—— *v.* Huddard, 322
—— *v.* Huthwaite, 592
—— *v.* Lyford, 598
—— *v.* Tatham, 920
—— *v.* Trye, 743
—— *v.* Underdown, 512
—— *v.* York (Archb. of), 68, 449
Doglioni *v.* Crispin, 485
Dolphin *v.* Robins, 468
Donald *v.* Suckling, 444
Done *v.* Walley, 713
Don's Estate (*re*), 468, 480, 482
Dormay *v.* Borrodaile, 543
Dorset (Duke of) *v.* Lord Hawarden, 567
Dost Aly Khan (*re goods of*), 892
Douglas *v.* Dysart, 875
—— *v.* Patrick, 168
—— *v.* Watson, 838
Dowell *v.* Steam Navigation Co., 218
Downing *v.* Capel, 94
Downman *v.* Williams, 782
Downs *v.* Ship, 845
Doyle *v.* Falconer, 39, 452
Dracachi *v.* Anglo-Egyptian Nav. Co., 440
Drake *v.* Drake, 592
—— *v.* Pywell, 363
Dresser *v.* Bosanquet, 287, 648
Drewe *v.* Lanson, 342
Driver *v.* Benton, 270
Drouet *v.* Taylor, 913
Drummond *v.* The Att.-Gen., 638
Drury *v.* De la Fontaine, 17

Duberley *v.* Gunning, 263
Dublin Wicklow Co. *v.* Slattery, 104
Du Bost *v.* Beresford, 310
Du Boulay *v.* Du Boulay, 186
Duckmanton *v.* Duckmanton, 565
Duckworth *v.* Johnson, 350
Dudden *v.* Guardians of Chitten Union, 189
Dudgeon *v.* Pembroke, 213
Dudley (Lord) *v.* Ward (Lord), 393, 394, 399
Duero (The), 800
Dugdale *v.* Lovering, 683
—— *v.* Reg., 306
Duke *v.* Ashby, 177
—— *v.* Forbes, 583, 695
Dumergue *v.* Rumsey, 399, 402
Dunbar (Magistrates of) *v.* The Duchess of Roxburghe, 640
Duncan *v.* Brighton Club Co., 581
Dunckle *v.* Wiles, 324
Dundee Harbour *v.* Dougal, 846
Dunford *v.* Trattles, 800
Dungannon (Lord) *v.* Smith, 416, 424
Dunkley *v.* Farris, 820
Dunlop *v.* Lambert, 780
Dunn *v.* Sales, 504, 608
—— *v.* Spurrier, 550
Dunston *v.* Paterson, 287
Durrant *v.* Eccles. Commrs., 255
Duvergier *v.* Fellows, 241, 690
Dyer *v.* Green, 629
—— *v.* Pearson, 761
Dyke *v.* Walford, 336
Dyne *v.* Nutley, 584
Dynen *v.* Leach, 810

E.

Eagle *v.* Charing Cross R. C., 200
Earle *v.* Hopwood, 689
—— *v.* Oliver, 715, 720
Early *v.* Benbow, 578
—— *v.* Garrett, 733, 758
East *v.* Twyford, 521
East Anglian R. C. *v.* Eastern Counties R. C., 697
Eastern Archipelago *v.* Reg., 50, 54, 59, 560
—— Counties R. C. *v.* Broom, 799, 828
—— Counties R. C. *v.* Marriage, 530, 636
—— Union R. C. *v.* Symonds, 919
East India Co. *v.* Paul, 855
—— *v.* Tritton, 669
Eastmead *v.* Whitt, 312
Eastwood *v.* Avison, 520
—— *v.* Bain, 745, 748
—— *v.* Kenyon, 708, 715
Eaton *v.* Swansea Waterworks Co., 365
Eddliston *v.* Barnes, 319
Eden *v.* Blake, 838, 840
Edgar *v.* Fowler, 674, 675, 676
Edger *v.* Knapp, 713
Edie *v.* Kingsford, 916
Edinburgh and Glasgow R. C. *v.* Magistrates of Linlithgow, 620
Edis *v.* Bury, 553
Edmonds *v.* Lawley, 31
Edmondson *v.* Stevenson, 312
Edmunds *v.* Bushell, 787
—— *v.* Downes, 613
—— *v.* Greenwood, 924
Edward *v.* Trevillick, 272
Edwards (*re*), 707
—— *v.* Aberayon Ins. Soc., 695
—— *v.* Bates, 77
—— *v.* Baugh, 703
—— *v.* Grace, 857
—— *v.* Havill, 454
—— *v.* Hodges, 529
—— *v.* Martyn, 130
—— *v.* Ward, 248
Egerton *v.* The Earl of Brownlow, 348, 423, 432, 433, 487, 687
Egremont (Earl of) *v.* Saul, 883
Eichholz *v.* Bannister, 758, 759
Elbinger *v.* Armstrong, 222
Eldrich's case, 577
Eleanor (The), 188
Electric Telegraph Co. *v.* Brett, 636
—— *v.* Salford, Overseers of, 371
Eliott *v.* Bishop, 31

Eliott *v.* Johnson, 442
—— *v.* North Eastern R. C., 629
—— *v.* Royal Exchange Ass. Co., 692, 751
—— *v.* South Devon Railway Co., 97
—— *v.* Turner, 510
Elkin *v.* Baker, 161
Ellcock *v.* Mapp, 654
Ellis *v.* Bridgnorth (the Mayor of), 432, 897
—— *v.* Griffith, 151
—— *v.* Hopper, 111
—— *v.* Lofthouse Iron Co., 369
—— *v.* Russell, 678
—— *v.* Sheffield Gas Consumers Co., 804
—— *v.* Smith, 142
Ellston *v.* Deacon, 785
Elsee *v.* Gatward, 701
Elwes *v.* Maw, 391, 393, 400
Embry *v.* Owen, 196, 337, 356
Emerson *v.* Brown, 280
—— *v.* Emerson, 861
Emery *v.* Webster, 255
Emilie (The), 893
Emmens *v.* Elderton, 608, 712, 720
Emmerton *v.* Matthews, 739, 742
Empress Engineering Co. (*re*), 826
England *v.* Marsden, 823
Enohin *v.* Wylie, 584
Entick *v.* Carrington, 3, 36, 90, 181, 407, 639, 656, 797
Ernest *v.* Nicholls, 785
Esdaile *v.* Lund, 115
—— *v.* Maclean, 636
Esposito *v.* Bowden, 232, 240, 244
Etherton *v.* Popplewell, 295
Ething *v.* U. S. B., 99
Evans *v.* Earl, 602
—— *v.* Edmonds, 686, 755
—— *v.* Hutton, 237
—— *v.* Jones, 67, 138, 282
—— *v.* Powis, 843
—— *v.* Rees, 23, 117, 446
—— *v.* Scott, 577
Everard *v.* Poppleton, 577
Everett *v.* London Assurance, 199, 211
—— *v.* Robinson, 850
Every *v.* Smith, 668
Ewart *v.* Cochrane, 447, 461
—— *v.* Jones, 89, 101, 190
Ewbank *v.* Nutting, 801
Ewer *v.* Jones, 185
Ewin *v.* Lancaster, 839
Exall *v.* Partridge, 713
Exeter (The Bishop of) *v.* Marshall, 153, 173
—— (Mayor of) *v.* Warren, 60

F.

Facey *v.* Hurdom, 647
Fagan *v.* Harrison, 823
Fagg *v.* Nudd, 718
Fairchild *v.* Gaire, 844
Fairhurst *v.* The Liverpool Adelphi Loan Association, 287
Falmouth (Lord) *v.* George, 874
—— —— *v.* Roberts, 149
—— (Earl of) *v.* Thomas, 841
Farebrother *v.* Ansley, 682
Farley *v.* Danks, 190
Farmer *v.* Arundel, 266
—— *v.* Mottram, 834
—— *v.* Russell, 678
Farrall *v.* Hilditch, 504
Farrant *v.* Barnes, 194, 745
—— *v.* Nichols, 520
Farrar *v.* Hutchinson, 678
Farrer *v.* Close, 395
Farrow *v.* Wilson, 230
Faulkner *v.* Johnson, 899
—— *v.* Lowe, 210
Faunsett *v.* Carpenter, 508
Faviell *v.* Gaskoin, 388
Fay *v.* Prentice, 351, 372, 373
Fazakerley *v.* M'Knight, 148
Feather *v.* Reg., 51, 55, 56, 69, 137, 560, 820, 821
Fector *v.* Beacon, 794
Fellowes *v.* Clay, 526
—— *v.* Gwydye, 729
Feltham *v.* England, 811
Fenn *v.* Bittleston, 445
—— *v.* Harrison, 782
Fennell *v.* Ridler, 17, 18
Fenner *v.* Taylor, 660

Fenton *v.* City of Dublin Steam Packet Company, 801
—— *v.* Emblers, 854
—— *v.* Hampton, 39, 453
—— *v.* Livingstone, 172, 468, 482, 485
Fenwick *v.* Schmalz, 234
Fereday *v.* Wightwick, 428
Feret *v.* Hill, 289, 668, 686
Ferguson *v.* The Earl of Kinnoul, 85
—— *v.* Mahon, 107
Fergusson *v.* Norman, 695
Fermor's case, 282
Fermoy Peerage case, 640, 641, 884
Fernandes (*re*), 923
Fernandez (*ex pte.*), 89, 923
Fernie *v.* Young, 96
Fernley *v.* Worthington, 84
Feronia (The), 663
Ferrand *v.* Bischoffsheim, 781
Ferrier *v.* Howden, 130
Festing *v.* Allen, 513, 578
Fetherston *v.* Fetherston, 521, 604
Fetter *v.* Beal, 324
Field *v.* Adames, 273
—— *v.* Lelean, 881
Filleter *v.* Phippard, 366
Finch *v.* Miller, 169
Findon *v.* Parker, 273
Fineux *v.* Horenden, 131
Finney *v.* Beesley, 130
—— *v.* Finney, 317
Fish *v.* Broket, 17
—— *v.* Kelly, 708
Fisher *v.* Apollinaris Co., 689
—— *v.* Bridges, 679, 708
—— *v.* Clement, 313
—— *v.* Dixon, 394, 395
—— *v.* Magnay, 280
—— *v.* Owen, 924
—— *v.* Ronalds, 923
—— *v.* Waltham, 703
Fishmongers' Co. *v.* Dimsdale, 629
—— *v.* Robertson, 117
Fitch *v.* Jones, 710
Fitton *v.* Accidental Death Insurance Co., 211, 552
Fitzgerald's case, 534
Fitzgerald *v.* Dressler, 899
—— *v.* Fitzgerald, 120
Fitzjohn *v.* Mackinder, 199, 222
Fitzmaurice *v.* Bayley, 628, 823
Fitzroy *v.* Gwillim, 693
Fivaz *v.* Nicholls, 190, 677, 684
Fleckner *v.* United States Bank, 822
Fleet *v.* Perrins, 443
Fleming *v.* Dunlop, 130
—— *v.* Fleming, 567, 568
—— *v.* Manchester & Sheffield R. C., 194
Fletcher *v.* Braddick, 801
—— *v.* Calthrop, 529
—— *v.* Smith, 355
—— *v.* Sondes (Lord), 178, 184
Flemyng *v.* Hector, 788
Flight *v.* Gray, 838
—— *v.* Reed, 680, 718
—— *v.* Thomas, 365
Flood *v.* Patterson, 853, 854
Florence *v.* Drayson, 463
—— *v.* Jennings, 323, 463
Flory *v.* Denny, 466
Foley (Lord) *v.* Commissioners of Inland Revenue, 527
—— *v.* Addenbrooke, 402, 505
—— *v.* Fletcher, 527
Foljamb's case, 453
Follett *v.* Hoppe, 272
Forbes *v.* Cochrane, 16
—— *v.* Forbes, 463
—— *v.* Marshall, 554
—— *v.* Smith, 849
Force *v.* Warren, 311
Ford *v.* Beech, 498, 551
—— *v.* Elliott, 921
—— *v.* Lacey, 139
—— *v.* Leche, 793
—— *v.* Tynte, 337
Fordyce *v.* Bridges, 525
Foreman *v.* Free Fishers of Whitstable, 876, 883
Forman *v.* Wright, 252, 709
Forster *v.* Forster, 263
—— *v.* Mackreth, 785
Forsyth *v.* Riviere, 344
Forward *v.* Pittard, 224
Foster *v.* Allanson, 324
—— *v.* Bates, 857, 862
—— *v.* Charles, 748
—— *v.* Dawber, 836, 837
—— *v.* Dodd, 89, 90

Foster *v.* Mackinnon, 672, 691
—— *v.* Mentor Life Assurance Co., 881
—— *v.* Pearson, 671
—— *v.* Pritchard, 25
—— *v.* Smith, 735, 747
—— *v.* Spooner, 448
Fountain *v.* Boodle, 312
Fourdrin *v.* Gowdey, 34
Fowell *v.* Tranter, 501
Fowkes *v.* Manchester and London Life Ass. Co., 552, 610, 613
Fowler *v.* Padget, 643
Fox *v.* Mackreth, 730
Fragano *v.* Long, 780
Francis *v.* Cockrell, 741, 745
—— *v.* Hawkesley, 98
—— *v.* Hayward, 461
Frank *v.* Frank, 649
Franklin *v.* Carter, 267
—— *v.* Neate, 444
Franklyn *v.* Lamond, 782
Fray *v.* Fray, 310
—— *v.* Voules, 193
Frazer *v.* Jordan, 660
—— *v.* Hatton, 704
Freake *v.* Cranefeldt, 855
Fredericks, *app.*, Howie, *resp.*, 371
Free Fishers of Whitstable *v.* Gann, 446
Freegard *v.* Barnes, 121
Freeman, *app.*, Read, *resp.*, 94, 164
—— *v.* Baker, 738
—— *v.* Cooke, 284
—— *v.* East India Co. 764
—— *v.* Jeffries, 251, 255, 670
—— *v.* Read, 94
—— *v.* Rosher, 830
—— *v.* Steggall, 287
—— *v.* Tranah, 80, 117, 129
Freke *v.* Carberry, 485
Fremlin *v.* Hamilton, 703
Freshfields Trusts, 442
Frewen *v.* Phillips, 363
Frith *v.* Guppy, 330
—— *v.* Wollaston, 834
Frost *v.* Oliver, 453
Fryer *v.* Kinnersley, 311
Fuentes *v.* Montis, 762
Fuller *v.* Wilson, 752, 753
Furber *v.* Sturmey, 76
Furnis *v.* Leicester, 759
Furnival *v.* Coombes, 537
—— *v.* Stringer, 131
Furze *v.* Sharwood, 509
Fussell *v.* Daniell, 502

G.

Gabriel *v.* Dresser, 842
Gadsby, *app.*, Barrow, *resp.*, 577
Gahan *v.* Lafitte, 81
Gainsford *v.* Griffith, 607
Gale *v.* Abbott, 365
—— *v.* Reed, 533, 535
Galley *v.* Barrington, 542, 637
Galliard *v.* Laxton, 90
Galloway *v.* Jackson, 703
Galway *v.* Baker, 629
Gambart *v.* Ball, 346
—— *v.* Sumner, 302
Gamble *v.* Kurtz, 345
Games (*ex pte.*) 834
Ganley *v.* Ledwidge, 764
Garden *v.* Bruce, 854
Gardiner *v.* Gray, 616
—— *v.* Lucas, 29
Gardner *v.* Campbell, 297
—— *v.* Walsh, 148
Garland *v.* Carlisle, 13, 127, 135
Garnett *v.* Ferrand, 82, 83
Garrard *v.* Hardey, 698
Garrett *v.* Handley, 981
Garton *v.* Bristol and Exeter R. C., 77
Gartside *v.* Radcliff, 893
Gascoigne *v.* Harris, 326
Gaslight and Coke Co. *v.* Turner, 680, 688
Gaters *v.* Madeley, 443
Gateward's case, 874
Gathercole *v.* Miall, 86, 310
Gattorno *v.* Adams, 508
Gaunt *v.* Fymney, 362
—— *v.* Taylor, 577
Gauntlett *v.* King, 798
Gautret *v.* Egerton, 264
Gaved *v.* Martyn, 358, 359

Gayford *v.* Nicholls, 187, 804
Gaylard *v.* Morris, 273
Geddis *v.* The Proprietors of Bann Reservoir, 191
Geere *v.* Mare, 679, 680
Gelen *v.* Hall, 84
General Mutual Insurance Co. *v.* Sherwood, 212
General Steam Navigation Co. *v.* British and Colonial Steam Navigation Co., 819
General Steam Navigation Co. *v.* Rolt, 660
General Steam Navigation Co. *v.* Slipper, 161
Generous (The), 238
Genner *v.* Sparkes, 411
George *v.* Skivington, 744
Gerhard *v.* Bates, 707, 745, 748
Gerish *v.* Chartier, 914
Gether *v.* Capper, 555
Gibbs *v.* Flight, 876
—— *v.* Guild, 281, 853
—— *v.* Lawrence, 606
—— *v.* Ralph, 320
—— *v.* Stead, 109
Giblin *v.* M'Mullen, 103
Gibson *v.* Bruce, 250
—— *v.* Dickie, 433
—— *v.* Doeg, 897
—— *v.* Hammersmith R. C., 399
—— *v.* Minet, 288, 501
—— *v.* Preston (Mayor of), 818
Gidley *v.* Palmerston (Lord), 819
Gidlow *v.* L. & Y. Ry. Co., 271
Gifford *v.* Livingstone, 145
—— *v.* Yarborough (Lord), 158
Gilbertson *v.* Richardson, 201
Gildart *v.* Gladstone, 557
Gilding *v.* Eyre, 122
Giles *v.* Grover, 67
—— *v.* Spencer, 838
Gill (*in the goods of*), 632
Gill *v.* Cubitt, 672
—— *v.* Dickinson, 876
Gillett *v.* Offor, 982
Gilmore *v.* Shuter, 30, 31
Gilpin *v.* Fowler, 314
Gingell *v.* Purkins, 250
Giraud *v.* Richmond, 842
Girdlestone *v.* Brighton Aquarium, 19, 328
Gittins *v.* M'Dermott, 466
Glaholm *v.* Hays, 508
Glanville *v.* Stacey, 139
Gleadow *v.* Atkin, 915
Gleaves *v.* Parfitt, 870
Gledstanes *v.* Sandwich (Earl of), 47, 60
Gloucester (the Mayor, &c., of) *v.* Osborn, 564
Glyn, Mills and Co. *v.* E. & W. India Dock Co., 178
Goblet *v.* Beechy, 563
Goddard *v.* Cox, 772
—— *v.* Hodges, 772
—— *v.* Jeffreys, 260
Godefroi *v.* Jay, 193
Godfrey *v.* Bullock, 338
Godts *v.* Rose, 881
Godwin *v.* Culling, 98
Goldham *v.* Edwards, 836
Gollan *v.* Gollan, 148, 642
Gomery *v.* Bond, 249, 250
Gompertz *v.* Bartlett, 740
Goodall *v.* Lowndes, 675
Goode *v.* Burton, 459
Goodman *v.* Edwards, 588
—— *v.* Harvey, 671
Goodright *d.* Hall *v.* Richardson, 579
—— *v.* Vivian, 380
Goodtitle *v.* Bailey, 501
—— *v.* Baldwin, 62
—— *v.* Gibbs, 173, 582
—— *v.* Southern, 588
—— *v.* Woodward, 825
Goodwin *v.* Hubbard, 668
Goodwyn *v.* Cheveley, 102
Gordon *v.* Ellis, 288, 761
—— *v.* Howden, 673
—— *v.* Mony, 286
—— *v.* Whitehouse, 580
Gorgier *v.* Mieville, 769
—— *v.* Morris, 704
Gorham *v.* Bishop of Exeter, 110, 641
Gorris *v.* Scott, 186
Gorrissen *v.* Perrin, 747, 881
Gorton *v.* Gregory, 443

Gosling *v.* Veley, 134, 145, 182, 183, 451
Goss *v.* Nugent (Lord), 838, 840
Gosset *v.* Howard, 89, 907
Gott *v.* Gandy, 607, 646
Gough *v.* Findon, 704
Gould *v.* Coombs, 149
—— *v.* Oliver, 262
Gowdy *v.* Duncombe, 153
Grace *v.* Clinch, 119
Graff *v.* Evans, 528
Graham *v.* Berry, 138
—— *v.* Darcey, 580
—— *v.* Ewart, 461
—— *v.* Furber, 282
—— *v.* Ingleby, 655, 660
—— *v.* Van Diemen's Land Co., 102
Grand Junction Canal *v.* Shugar, 189
Grand Junction R. C. *v.* White, 634
Granger *v.* George, 855
Grant *v.* Da Costa, 709
—— *v.* Grant, 564
—— *v.* Norway, 792
Grantham Canal Navigation Co. *v.* Hall, 657
—— *v.* Hawley, 465
Grath *v.* Ross, 581
Graves *v.* Ashford, 346
—— *v.* Legg, 620
—— *v.* Weld, 382
Gray *v.* Cox, 739
—— *v.* Johnston, 193
—— *v.* Liverpool and Bury R. C., 559
—— *v.* Pullen, 804, 806
—— *v.* Reg., 315
Great Central Gas Co. *v.* Clarke, 23
Great Eastern (The), 792
Great Northern R. C. *v.* Harrison, 264, 367, 505
Great Northern R. C. *v.* Wiltham, 704
Great Western R. C. *v.* Bennett, 187
Great Western R. C. *v.* Crouch, 102
Great Western R. C. *v.* Fletcher, 445
Great Western R. C. *v.* Goodman, 780
Great Western of Canada *v.* Braid, 234
Greathead *v.* Bromley, 318
Greaves *v.* Tofield, 541
Green *v.* Attenborough, 148
—— *v.* Baverstock, 686
—— *v.* Chapman, 313
—— *v.* Cobden, 117
—— *v.* Elgie, 89, 124
—— *v.* Elmslie, 212
—— *v.* Kopke, 782
—— *v.* Laurie, 272
—— *v.* London General Omnibus Co., 802
—— *v.* Saddington, 717
—— *v.* Sichel, 161
Greene *v.* Armsteed, 585
Greenwich *v.* Maudslay, 3
Greenwood *v.* Rothwell, 518
—— *v.* Sutcliffe, 539
—— *v.* Taylor, 771
Gregg *v.* Wells, 285
Gregory *v.* Brunswick (Duke of), 129
—— *v.* Cotterell, 13, 743, 805
—— *v.* Des Anges, 620
—— *v.* Piper, 802
Gregson *v.* Gilbert, 214
Grell *v.* Levy, 689
Gresham *v.* Postan, 759
Gressell *v.* Robinson, 713
Greville *v.* Chapman, 888
Grey *v.* Pearson, 514, 531, 549
Griffin *v.* Langfield, 780
Griffiths *v.* Gidlow, 264
—— *v.* Owen, 842
—— *v.* Perry, 435
—— *v.* Puleston, 388, 389, 448
Grill *v.* General Iron Screw Colliery Co., 212, 216
Grimmán *v.* Legge, 613
Grimoldy *v.* Wells, 735
Grimsley *v.* Parker, 843
Grinnell *v.* Wells, 494
Grise *v.* Kendrick, 761
Grissell *v.* Bristowe, 874, 882
Grocers' Co. *v.* Donne, 349, 352
Groenvelt *v.* Burwell, 81
Grote *v.* Chester and Holyhead R. C., 350

Groucott *v.* Williams, 348, 353
Grove *v.* Aldridge, 67
—— *v.* Dubois, 787
—— *v.* Withers, 447, 451
Grover *v.* Burningham, 414, 512
Grymes *v.* Boweren, 400
Guest *v.* Warren, 324
Guille *v.* Swan, 201
Gullett *v.* Lopez, 154
Gulliver *v.* Cosens, 293
—— *v.* Gulliver, 849
Gully *v.* Bishop of Exeter, 702
Gunn *v.* Roberts, 792
Gurly *v.* Gurly, 632
Gurney *v.* Behrend, 441
—— *v.* Evans, 286
—— *v.* Womersley, 740, 768
Gurrin *v.* Kopera, 504
Gwithin *v.* Stone, 724
Gwyn *v.* Hardwicke, 641
—— *v.* Neath Canal Co., 538
Gwynne *v.* Burnell, 156
—— *v.* Davy, 834
Gynes *v.* Kemsley, 584
Gyse *v.* Ellis, 780

H.

Habergham *v.* Vincent, 660
Haddon *v.* Ayres, 262, 505
—— *v.* Lott, 199
Hadfield's case, 145
Hadkinson *v.* Robinson, 215, 216
Hadley *v.* Clarke, 240
—— *v.* Green, 325
—— *v.* Taylor, 264
Hagedorn *v.* Whitmore, 212
Haggerston *v.* Hanbury, 502
Hahn *v.* Corbett, 212
Haigh *v.* Paris, 327
—— *v.* Sheffield (T. C.), 301
Haine *v.* Davy, 139
Haines *v.* East India Co., 161
—— *v.* Roberts, 187, 353
—— *v.* Welch, 385
Haire *v.* Wilson, 313
Hale *v.* Rawson, 240, 243
—— *v.* Webb, 650
Hales *v.* Petit, 66
Haley *v.* Hammersley, 397, 398
Halhead *v.* Young, 216, 839
Hall *v.* Bainbridge, 324
—— *v.* Bristol (the Mayor of), 186
—— *v.* Conder, 733, 739, 759, 643
—— *v.* Dysen, 690
—— *v.* Featherstone, 672, 710
—— *v.* Flockton, 842
—— *v.* Janson, 881
—— *v.* Johnson, 813
—— *v.* London Brewery Co., 726
—— *v.* Lund, 447, 450
—— *v.* Nottingham, 875
—— *v.* Warren, 518, 637
—— *v.* Wright, 229, 230, 468
Hall's case, 345
Hallett *v.* Dowdall, 654
—— *v.* Wylie, 229
Hallewell *v.* Morrell, 508
Halley (The), 819
Halliday *v.* Holgate, 444, 767
Hallifax *v.* Lyle, 287
Halliwell *v.* Trappes, 647
Halton *v.* Cave, 529
Hambleton *v.* Veere, 184
Hambly *v.* Trott, 866
Hamelin *v.* Bruck, 148
Hamilton *v.* Anderson, 81, 83
—— *v.* Hamilton, 469
—— *v.* White, 264
Hammack *v.* White, 299
Hammersmith Rent-charge (*re*), 107, 109
Hammersmith and City R. C. *v.* Brand, 192, 200, 372, 530, 893
Hammond *v.* Bendyshe, 108
Hampden *v.* Walsh, 675
Hancock *v.* Austin, 407
—— *v.* Somes, 332
—— *v.* Welsh, 321
—— *v.* York, Newcastle, and Berwick R. C., 361
Hanmer *v.* Chance, 876
Hannan *v.* Mockett, 337
Hardcastle *v.* Dennison, 517
—— *v.* South Yorks. R. C., 264
Harden *v.* Clifton, 148, 834
Harding *v.* Pollock, 457
Hardingham *v.* Allen, 168, 771

Hardwicke (Earl of) *v.* Douglas, 514
—— *v.* Lord Sandys, 615
Hardy (*in the goods of*), 150
—— *v.* Tingey, 547
—— *v.* Veasey, 193
Hare *v.* Horton, 396, 398, 610
Hargreave *v.* Smee, 553
Hargreaves *v.* Parsons, 838
Harlow *v.* Read, 582
Harman *v.* Cam, 257
Harmer *v.* Steele, 837
Harnor *v.* Groves, 697, 747
Harper *v.* Burgh, 442
—— *v.* Carr, 107
—— *v.* Williams, 706, 782
Harratt *v.* Wise, 254
—— *v.* Thomas, 320
Harries (*re*), 777
Harris *v.* Anderson, 350
—— *v.* Davis, 642
—— *v.* James, 817
—— *v.* Truman & Co., 280
—— *v.* Lawrence, 30
—— *v.* Lincoln (Bishop of), 562
—— *v.* Lloyd, 252
—— *v.* Quine, 849
—— *v.* Robinson, 22
—— *v.* Shaw, 765
Harrison *v.* Blackburne, 534
—— *v.* Bush, 311
—— *v.* Cage, 722
—— *v.* Cotgreave, 149
—— *v.* Great Northern R.C., 355
—— *v.* Harrison, 416
—— *v.* Heathorn, 117, 698
—— *v.* Hyde, 584
—— *v.* Ruscoe, 288
—— *v.* Seymour, 659
—— *v.* Southampton (Mayor of), 901
—— *v.* Stickney, 32
—— *v.* Wright, 134
Harrold *v.* Whitaker, 505
Harrop, *app.*, Fisher, *resp.*, 443
—— *v.* Hirst, 140, 195, 197
Harrower *v.* Hutchinson, 750
Harrup *v.* Bayley, 164, 265
Hart *v.* Bassett, 197
—— *v.* Crowley, 309
—— *v.* Miles, 703
Hart *v.* Prendergast, 655
—— *v.* Swaine, 732
—— *v.* Windsor, 727
Hartland *v.* Jukes, 850
Hartley *v.* Hindmarsh, 332
—— *v.* Ponsonby, 703
Harvey *v.* Brydges, 413
—— *v.* Farnie, 480, 481
—— *v.* Gibbons, 243
—— *v.* Grabham, 841
—— *v.* Harvey, 395
—— *v.* Pocock, 295
—— *v.* Towers, 710
Harwood *v.* Great Northern R. C., 345
—— *v.* Goodright, 895
Haseler *v.* Lemoyne, 830
Hasleham *v.* Young, 825
Hastings Peerage (The), 902
Hatch *v.* Trayes, 709
Hatfield *v.* Phillips, 763
Hawkes *v.* Eastern Co. R. C., 690
—— *v.* Sanders, 715
Hawkins *v.* Alder, 138
—— *v.* Hall, 281
Hay *v.* Coventry (Earl of), 544
Haycraft *v.* Creasy, 349, 745
Haydn *v.* Hayward, 894
Hayes *v.* Warren, 912
Hayton *v.* Trevin, 875
Hayward *v.* Bennett, 242
—— *v.* Duff, 661
Hazeldine *v.* Grove, 84
Heald *v.* Carey, 780
—— *v.* Kenworthy, 782
Heap *v.* Barton, 402
Heard *v.* Wadham, 814
Hearle *v.* Hicks, 513
Hearn *v.* Bellman, 144
Hearne *v.* Garthon, 300, 820
Heath *v.* Brewer, 94
—— *v.* Chilton, 830
—— *v.* Durant, 840
—— *v.* Elliott, 154
—— *v.* Heape, 100
—— *v.* Unwin, 315, 345
Heathcote *v.* Wing, 117
Heather *v.* Webb, 717
Heaven *v.* Pender, 195, 350
Heffer *v.* Meadows, 498
Heffield *v.* Meadows, 838
Heilbut *v.* Nevill, 288

Heilbutt *v.* Hickson, 735
Hellawell *v.* Eastwood, 26, 397
Helps *v.* Clayton, 708
Helsham *v.* Blackwood, 331
Hemans *v.* Picciotto, 506
Hemming *v.* Hale, 795
—— *v.* Hole, 192
—— *v.* Tremery, 150
Hemmings *v.* Gasson, 101
Hemp *v.* Garland, 854
Henderson *v.* Barnwell, 795
—— *v.* Broomhead, 190
—— *v.* London and North Western R. C., 463
—— *v.* Sherborne, 25, 529
—— *v.* Stobart, 534
Henniker *v.* Wigge, 774
Henson *v.* Coope, 838
Henwood *v.* Harrison, 313
—— *v.* Oliver, 627
Hercules (The), 205
Herring *v.* Metropolitan Board of Works, 200
Heseltine *v.* Siggers, 508
Heslop *v.* Chapman, 100, 103
Hesse *v.* Stevenson, 535
Hewitt *v.* Isham, 154, 448
Heydon's case, 639
Heyman *v.* Fleuker, 763
—— *v.* Reg., 174
Heysham *v.* Forster, 904
Heyworth *v.* Knight, 822
Hibblewhite *v.* M'Morine, 653
Hickman *v.* Machin, 341
Hicks *v.* Faulkner, 100
Hide *v.* Thornborough, 187
Higgins *v.* Butcher, 205
—— *v.* Hopkins, 788
—— *v.* M'Adam, 793
—— *v.* Senior, 666, 781
Higgons *v.* Burton, 697, 782
Higgs *v.* Assam Tea Co., 441
—— *v.* Scott, 251
Higham *v.* Ridgway, 916
Hilbery *v.* Hatton, 823
Hilcoat *v.* Abp. of Canterbury, 185
Hill *v.* Balls, 759
—— *v.* Cowdery, 457
—— *v.* Grange, 508
—— *v.* Gray, 746
—— *v.* Hall, 24
Hill *v.* Thompson, 49
—— *v.* Tupper, 432, 433
—— *v.* Mitson, 690
Hills *v.* London Gas Light Co., 50
—— *v.* Street, 269
—— *v.* Sughrue, 240
Hilton *v.* Eckerley, 370
—— *v.* Granville, 876
—— *v.* Swan, 764, 768
—— *v.* Whitehead, 187, 353
Hinchcliffe *v.* Kinnoul (Earl of), 450
Hine *v.* Reynolds, 540
Hipkins *v.* Birmingham Gas Light Co., 301, 356
Hirschfeld *v.* Smith, 149
Hitchcock *v.* Way, 30
Hitchin *v.* Groom, 574
Hitchman *v.* Walton, 396
Hix *v.* Gardiner, 150
Hoare *v.* Dickson, 327
—— *v.* Graham, 838
Hobbs *v.* Henning, 693
Hobson *v.* Blackburn, 565, 588
—— *v.* Neale, 30
—— *v.* Thelluson, 192, 343
Hochster *v.* De la Tour, 243
Hodges *v.* Horsfall, 630
Hodgkinson *v.* Ennor, 188, 351, 356
—— *v.* Fernie, 203, 820
—— *v.* Wyatt, 34
Hodgson *v.* Ambrose, 512
—— *v.* De Beauchesne, 485
—— *v.* Field, 449, 450
—— *v.* Malcolm, 212
—— *v.* Sidney, 220
Hodsoll *v.* Stallebrass, 184
Hodson *v.* Walker, 328
Hoey *v.* Felton, 199
Hogan *v.* Jackson, 604
Hogg *v.* Ward, 102
Holcroft *v.* Hoggins, 787
Holden *v.* Smallbrooke, 337
Holder *v.* Soulby, 350
Holding *v.* Elliott, 881
Holdsworth *v.* Barsham, 580
—— *v.* City of Glasgow Bank, 292
Hole *v.* Sittingbourne and Sheerness R. C., 804
Holford, *app.*, George, *resp.*, 876

Holland *v.* Hodgson, 397
—— *v.* Russell, 669, 750
Holliday *v.* Morgan, 737
Hollier *v.* Eyre, 562
—— *v.* Laurie, 405
Hollis *v.* Palmer, 463
Holman *v.* Johnson, 693
Holme *v.* Guppy, 241
Holmes *v.* Clarke, 262
—— *v.* Goring, 451
—— *v.* Kerrison, 854
—— *v.* London and North-Western R. C., 345
—— *v.* Mackrell, 98
—— *v.* Mather, 227
—— *v.* Newlands, 323
—— *v.* North Eastern R. C., 366
—— *v.* Penney, 703
—— *v.* Simons, 154
—— *v.* Williamson, 713
—— *v.* Wilson, 372
Holroyd *v.* Breare, 83
—— *v.* Marshall, 466
Holt *v.* Ely, 77
—— *v.* Ward, 475
Homer *v.* Taunton, 314
Homfray *v.* Scroope, 855
Honywood *v.* Honywood, 379
Hooper *v.* Clark, 443
—— *v.* Lane, 13, 123, 290, 805
—— *v.* Treffry, 707
Hope *v.* Hope, 94
Hopkins *v.* Francis, 900
—— *v.* Freeman, 324
—— *v.* Great Northern R. C., 188
—— *v.* Hitchcock, 592, 739
—— *v.* Logan, 719
—— *v.* Tanqueray, 733, 747
—— *v.* Ware, 850
Hopkinson *v.* Lee, 505
—— *v.* Rolt, 339
—— *v.* Whaley, 858
Hopwood (*ex pte.*), 107
—— *v.* Whaley, 858
Horn *v.* Baker, 400
Hornby *v.* Close, 370
—— *v.* Lacy, 781
Horne *v.* Midland R. C., 201, 220, 221
—— *v.* Widlake, 264
Horsey *v.* Graham, 571
Horsfall *v.* Thomas, 686, 697
Horton *v.* Sayer, 651, 695
—— *v.* Westminster Improvement Commissioners, 689, 900
Horwood *v.* Smith, 766
Hotson *v.* Brown, 744
Houghton *v.* Houghton, 428
Houlden *v.* Smith, 81
Houldsworth *v.* Evans, 134
Household Coal and Iron Co. *v.* Neilson, 344
How *v.* Kirchner, 648
Howard *v.* Burtonwood, 263
—— *v.* Gossett, 42, 47
—— *v.* Shepherd, 745
—— *v.* Sheward, 787
—— *v.* Shrewsbury (Earl of), 530
Howden *v.* Standish, 13, 453
Howe *v.* Malkin, 817
Howell *v.* Coupland, 230
—— *v.* Richards, 633
—— *v.* Young, 855
Howton *v.* Frearson, 447
Howe *v.* Malkin, 817
Hoye *v.* Bush, 92
Hoyt *v.* Thompson, 95
Hubbard *v.* Lees, 900
—— *v.* Mace, 409
Hubbersty *v.* Ward, 792
Hudson *v.* Clementson, 882
—— *v.* Ede, 555
—— *v.* M'Crae, 302
—— *v.* Roberts, 368
—— *v.* Stewart, 643
—— *v.* Tabor, 226
Huffer *v.* Allen, 122, 318
Huggins *v.* Coates, 854
Hughes *v.* Buckland, 92
—— *v.* Clark, 898
—— *v.* Cornelius, 912
—— *v.* Great Western R. C., 134
—— *v.* Jones, 796
—— *v.* Statham, 456, 838
Hulse *v.* Hulse, 702
Humble *v.* Huntor, 288
Humblestone *v.* Welham, 161
Humfrey *v.* Dale, 622, 782
Humphreys *v.* Green, 715
—— (*re*), 301

Humphreys *v.* Pensam, 909
Humphries *v.* Brogden, 187, 353, 354
Humphrys *v.* Pratt, 753
Hunsden *v.* Cheney, 746
Hunt *v.* Bate, 712
—— *v.* Chambers, 80
—— *v.* Goodlake, 101
—— *v.* Hort, 562
—— *v.* Hunt, 655
—— *v.* Peake, 187
Hunter (The), 893
Hunter *v.* Gibbons, 853
—— *v.* Leathley, 512
—— *v.* Stewart, 325
Huntley *v.* Russell, 393, 865
Hurdman *v.* North Eastern R. C., 349, 355
Hurst *v.* Great Western R. C., 881
Husband *v.* Davis, 288
Hutchinson *v.* Johnston, 342
—— *v.* Kay, 393
—— *v.* Sydney, 712
—— *v.* Tatham, 622
—— *v.* York, Newcastle, and Berwick R. C., 802, 810
Hutchison *v.* Birch, 409
Hutt *v.* Morrell, 326, 385
Hutton *v.* Balme, 136
—— *v.* Warren, 388, 619
Huxam *v.* Wheeler, 27, 526
Hyams *v.* Webster, 818
Hyatt *v.* Griffiths, 389
Hybart *v.* Parker, 653
Hyde *v.* Graham, 297
—— *v.* Johnson, 532, 794
—— *v.* Watts, 275
—— *v.* Windsor (Dean of), 859
Hydraulic Engineering Co. *v.* McHoffie, 221

I.

Ibottson *v.* Peat, 189, 337
Iggulden *v.* May, 535
Illidge *v.* Goodwin, 368
Ilott *v.* Wilkes, 263
Imperial Bank *v.* London & St. Katherine Docks, 342, 622
Imperial Gas Light and Coke Co. *v.* London Gas Light Co., 853
Imray *v.* Magnay, 342
Indermaur *v.* Dames, 264
India (Secretary of State of) *v.* Sahaba, 831
Ingham *v.* Primrose, 443
Inglis *v.* Butterby, 575
Inman *v.* Jenkins, 78
Ionides *v.* Pinder, 890
—— *v.* Universal Marine Insurance Co., 215
Ireland (Bank of) *v.* Archer, 700
Ireland *v.* Champneys, 865
Irnham (Lord) *v.* Child, 624
Ironmongers Co. *v.* Att.-Gen., 522
Ironsides (The), 34
Irvine *v.* Watson, 779
Irving *v.* Veitch, 613
Irwin *v.* Grey, 320, 900
Isherwood *v.* Oldknow, 135, 169
Islington Market Bill (*re*), 60
Ivatt *v.* Finch, 817
Ivay *v.* Hedges, 264
Ivimey *v.* Stocker, 359
Izon *v.* Gorton, 228, 728

J.

Jack *v.* M'Intyre, 518, 586
Jackson *v.* Carrington, 118
—— *v.* Clark, 594
—— *v.* Cobbin, 698, 703
—— *v.* Duchaire, 693
—— *v.* Galloway, 130
—— *v.* Pesked, 174, 372
—— *v.* Smithson, 368
—— *v.* Tollett, 806
—— *v.* Woolley, 32, 853
Jacobs *v.* Layborn, 130
—— *v.* Seward, 246
Jacobson *v.* Blake, 293, 295
Jacques *v.* Chambers, 565
James (*ex pte.*), 257
—— *v.* Child, 771
—— *v.* Cochrane, 504
—— *v.* Isaacs, 30, 828
—— *v.* Phelps, 100

Janes *v.* Whitbread, 581, 589
Janvrin *v.* De la Mare, 135
Jarmain *v.* Hooper, 124, 793
Jarrett *v.* Kennedy, 755
Jefferys *v.* Boosey, 95, 346
Jeffreys *v.* Gurr, 713
Jeffries *v.* Alexander, 222
—— *v.* G. W. R., 337
—— *v.* Williams, 347
Jeffrys *v.* Evans, 461
Jegon *v.* Vivian, 517, 545
Jendwine *v.* Slade, 272, 736, 738
Jenkin *v.* Peace, 97
Jenkins *v.* Harvey, 883
—— *v.* Hughes, 518, 605
—— *v.* Turner, 368
—— *v.* Waldron, 184
Jenkyns *v.* Usborne, 440, 763
Jenner *v.* Jenner, 604
Jennings *v.* Brown, 708
—— *v.* Florence, 190
—— *v.* Gt. Northern R. C., 706
—— *v.* Rundall, 310
Jepson *v.* Key, 466
Jervis *v.* Tomkinson, 240
Jesse *v.* Roy, 573
Jessel *v.* Bath, 792
Jesson *v.* Wright, 605
Jessopp *v.* Lutwyche, 695
Jewison *v.* Dyson, 638
Jinks *v.* Edwards, 447, 726
Johns *v.* Dickinson, 611
Johnson *v.* Crédit Lyonnais Co., 763
—— *v.* Dodgson, 780
—— *v.* Johnson, 725
—— *v.* Lansley, 677
—— *v.* Leigh, 412
—— *v.* Liversedge, 29
—— *v.* Oserton, 796
—— *v.* Pye, 310
—— *v.* Royal Mail Steam Packet Co., 270, 707, 713
—— *v.* Simcock, 545
—— *v.* Smith, 127
—— *v.* Windle, 768
Johnston *v.* Raylton, 795
—— *v.* Stear, 767
Johnstone *v.* Sutton (*in error*), 83, 169, 181, 202, 203, 886
—— *v.* Usborne, 620, 879
Joliffe *v.* Baker, 732, 756
Jonassohn *v.* Young, 243, 506
Jones (*re*), 636
—— *v.* Atherton, 342
—— *v.* Bowden, 738, 758
—— *v.* Bright, 739, 741
—— *v.* Brown, 640
—— *v.* Carter, 173
—— *v.* Chapman, 88, 668
—— *v.* Clarke, 738
—— *v.* Davies, 492
—— *v.* Festiniog R. C., 349, 355, 366
—— *v.* Giles, 695
—— *v.* Hart, 798
—— *v.* How, 232
—— *v.* Jones, 413
—— *v.* Just, 740, 742
—— *v.* Littledale, 620
—— *v.* Mersey Docks, 68
—— *v.* Newman, 567
—— *v.* Peppercorn, 879
—— *v.* Pope, 848
—— *v.* Randall, 248
—— *v.* Ryde, 670, 740
—— *v.* St. John's College, 241, 243
—— *v.* Sawkins, 843
—— *v.* Smart, 39
—— *v.* Taplin, 135, 362
—— *v.* Waite, 686, 690
—— *v.* Yates, 288
Jordan *v.* Adams, 576, 505
Jordin *v.* Crump, 264
Josh *v.* Josh, 584
Josling *v.* Kingsford, 739
Jowett *v.* Spencer, 535
Jowle *v.* Taylor, 94
Joyce *v.* Metrop. B. of W., 138
Justice *v.* Gosling, 332

K.

Karnak (The), 452, 792
Katharina (The), 261
Kaye *v.* Brett, 780

Kaye v. Dutton, 703, 704, 718
—— v. Waghorn, 834
Kearney v. L. & B. R. Co., 299
Kearns v. Cordwainers' Co., 199
—— v. Durell, 267, 271, 709
Kearon v. Pearson, 235
Kearsley v. Cole, 659
Keates v. Earl of Cadogan, 728, 746
Keech v. Hall, 341
Keele v. Wheeler, 670, 739
Keene v. Beard, 443
Keighley's case, 225
Keir v. Leeman, 675, 687, 689
Kelly v. Lawrence, 280
—— v. Morray, 320
—— v. Partington, 199
—— v. Solari, 251, 253
—— v. Tinling, 311
Kelner v. Baxter, 537, 826
Kelsall v. Marshall, 76
—— v. Tyler, 653
Kemp v. Balls, 822
—— v. Finden, 713
—— v. Neville, 81, 82
Kempson v. Boyle, 881
Kendall v. Hamilton, 323
—— v. King, 792
Kennedy v. Brown, 202
—— v. Panama &c. Mail Co., 686, 739, 758
Kennet and Avon Navigation Co. v. Witherington, 188
Kenney v. Browne, 378
Kent v. Great Western R. C., 271
Kenyon v. Hart, 373
Kepp v. Wiggett, 143
Kerr v. Wauchope, 167, 665
Keyse v. Powell, 187
Kidgill v. Moor, 372
Kidston v. Empire Marine Ins. Co., 882
Kielly v. Carson, 455
Kimbray v. Draper, 29
Kimpton v. Eve, 389
Kindersley v. Chase, 912
King v. Bryant, 159
—— v. Gillett, 474, 722, 839
—— v. Hind, 882
—— v. Hoare, 322
—— v. Jones, 856
King v. Melling, 541
—— v. Norman, 321, 910, 913
—— v. Sears, 712
—— v. Spurr, 803
Kingdon v. Nottle, 856
Kingsbury v. Collins, 382, 384
Kingsford v. Merry, 697, 762
Kingston's (Duchess of) case, 163, 317, 410
Kingston-upon-Hull Dock Co. v. Browne, 557
Kinloch v. Secretary for India, 56
Kinnersley v. Cope, 322
Kinning v. Buchanan, 89, 158
Kintore (The Earl of) v. Lord Inverury, 636
Kintrea v. Preston, 726
Kirchner v. Venus, 648
Kirk v. Todd, 863
Kirkhaugh v. Herbert, 34
Kirkland v. Nisbett, 892
Kitchin v. Hawkins, 247, 771
Kitson v. West London Bank, 749
—— v. Julian, 602
Knapp v. Harden, 838
Knatchbull v. Grueber, 730
Knevett v. Pool, 383, 384
Knight v. Bennett, 388
—— v. Fox, 809
—— v. Gibbs, 200
—— v. Gravesend and Milton Waterworks Co., 505
—— v. Selby, 545
Knights v. Quarles, 857, 858
Kynaston v. Crouch, 823
Kynnaird v. Leslie, 483

L.

Labouchere v. Tupper, 774
Laidlaw v. Organ, 738
Laing v. Fidgeon, 616, 739, 741
—— v. Whaley, 188
Lamb v. Walker, 185
Lambert v. Bessey, 349
—— v. Taylor, 62
Lamert v. Heath, 739
Lampleigh v. Brathwait, 711

Lancashire Waggon Co. *v.* Fitzhugh, 444
Lancaster *v.* Eve, 393, 403
Lancaster & Carlisle R. C. *v.* Heaton, 111
Lane *v.* Cotton, 806
—— *v.* Bennett, 39
Langden *v.* Stokes, 839
Langley *v.* Hammond, 460
—— *v.* Headland, 669
Langmead *v.* Maples, 319
Langridge *v.* Levy, 944
Langston *v.* Langston, 499, 503
Langton *v.* Haynes, 30
Langton *v.* Hughes, 24
Lanman *v.* Lord Audley, 117
Lanyon *v.* Carne, 573
Lapsley *v.* Grierson, 901
Larpent *v.* Bibbey, 31
La Touche *v.* Hutton, 917
—— *v.* La Touche, 714
Latham *v.* Atwood, 382
—— *v.* Lafone, 636
Latimer *v.* Batson, 283
Latless *v.* Holmes, 29
Lattimore *v.* Garrard, 720
Laughter *v.* Pointer, 798, 806
Laughter's case, 232
Launock *v.* Brown, 407
Laurie *v.* Douglas, 213
—— *v.* Scholefield, 838
Law *v.* Blackburrow, 508
—— *v.* Parnell, 443
Lawes *v.* Purser, 164, 739
—— *v.* Rund, 850, 899
Lawless *v.* Anglo-Egyptian Cotton Co., 311
Lawrance *v.* Boston, 626
Lawrence *v.* Fletcher, 707
—— *v.* Great Northern R. C., 620
—— *v.* Hitch, 876, 903
—— *v.* Hodgson, 117
—— *v.* Sidebotham, 613
—— *v.* Walmsley, 660
—— *v.* Wilcock, 131
Lawton *v.* Lawton, 393, 394, 399
—— *v.* Salmon, 393, 394
—— *v.* Sweeney, 894
Lax *v.* Darlington (Corp.), 263
Lay *v.* Mottram, 503
Layton *v.* Hurry, 293
Leach *v.* Money, 90
Leak *v.* Howell, 797
Leame *v.* Bray, 201
Leary *v.* Patrick, 31
Leather Cloth Co. *v.* American Leather Cloth Co., 845
Le Case de Tanistry, 872
Ledsam *v.* Russell, 68, 636
Lee *v.* Bayes, 206, 765, 767
— *v.* Cooke, 274
— *v.* Evans, 139
— *v.* Everet, 778
— *v.* Gansell, 409
— *v.* Johnston, 900, 903
— *v.* Jones, 686
— *v.* Merrett, 250
— *v.* Milner, 557, 558
— *v.* Muggeridge, 708
— *v.* Reed, 661
— *v.* Riley, 369
— *v.* Simpson, 302, 315
— *v.* Wilmot, 714
Leech *v.* Lamb, 119
Leeds (The Duke of) *v.* Earl Amherst, 381, 523
—— *v.* Cheetham, 228
Lees *v.* Moseley, 518
Leete *v.* Hart, 94
Leggatt *v.* G. N. R., 319
Legge *v.* Boyd, 336
Leidman *v.* Schultz, 882
Leith *v.* Irvine, 151
Le Mason *v.* Dixon, 861, 865
Lemere *v.* Elliott, 717
Leonard *v.* Baker, 283
Leuckhart *v.* Cooper, 150
Levi *v.* Milne, 313
—— *v.* Sanderson, 26
Levy *v.* Moylan, 88, 118
Lewis *v.* Bright, 678
—— *v.* Campbell, 712
—— *v.* Clifton, 244
—— *v.* Davison, 698
—— *v.* G. W. Ry., 265
—— *v.* Jones, 838
—— *v.* Lane, 876
—— *v.* Levy, 312
—— *v.* Marshall, 509, 880
—— *v.* Puxley, 604
—— *v.* Read, 295, 830
—— *v.* Reilly, 785
Ley *v.* Ley, 512

Leyfield's (Dr.) case, 97
Lichfield (Mayor of) *v.* Simpson, 85
—— Union (Guardians of) *v.* Greene, 768, 845
Liddard *v.* Kain, 737
Liford's case, 127, 154, 448
Lightfoot *v.* Tenant, 693
Lilly v. Hays, 703
Limpus *v.* General Omnibus Co., 805
Lincoln College case, 547
Lindenau *v.* Desborough, 750
Lindgren *v.* Lindgren, 587
Lindsay *v.* Cundy, 761, 767
—— *v.* Gibbs, 464
—— *v.* Janson, 98
Lindus *v.* Melrose, 548
Line *v.* Stephenson, 607
Lion (The), 532, 819
Lister *v.* Lobley, 4
—— *v.* Perryman, 100
Litt *v.* Martindale, 77, 707
Little *v.* Newton, 796
Littlefield *v.* Shee, 708
Liver Alkali Works *v.* Johnson, 234, 235
Liverpool (Mayor of) *v.* Chorley Water Works Co., 6
—— Adelphi Loan Ass. *v.* Fairhurst, 652
—— Borough Bank *v.* Turner, 525
Liversidge *v.* Broadbent, 706
Livie *v.* Janson, 212
Llanbeblig Llandyfrydog (*In re*), 119
Llewellyn *v.* Jersey (Earl of), 584, 630
—— *v.* Llewellyn, 703
Lloyd *v.* Crispe, 242
—— *v.* General Iron Screw Collier Co., 215, 216
—— *v.* Guibert, 229, 500
—— *v.* Harrison, 88, 192
—— *v.* Jones, 874
—— *v.* Lloyd, 506
—— *v.* Oliver, 554
—— *v.* Pettijean, 480
—— *v.* Roberts, 902
—— *v.* Sandilands, 411
Lock *v.* Ashton, 121
Lockett *v.* Nicklin, 838
Lockwood *v.* Lever, 767
—— *v.* Wood, 638
Lockyer *v.* Ferriman, 318
Lofft *v.* Dennis, 228
Logan *v.* Hall, 292
—— *v.* Le Mesurier, 234
London (Mayor of) *v.* A.-G., 70
—— *v.* Cox, 904
—— *v.* Parkinson, 527
—— *v.* Reg., 445
London, Birmingham & South Staffordshire Bank (*re*), 777
London Gas Light Co. *v.* Vestry of Chelsea, 506
London Grand Junction R. C. *v.* Freeman, 586
London Guarantee Co. *v.* Fernley, 696
London Loan, &c., Co. *v.* Drake, 399, 400, 462
London and North-Western R. C. *v.* Lindsay, 111
Long *v.* Millar, 630
Longbottom *v.* Berry, 392, 395, 397
Longmeid *v.* Holliday, 745
Longstaff *v.* Meagoe, 397
Longworth *v.* Yelverton, 922
Lonsdale (Earl of) *v.* Rigg, 461
Loosemore *v.* Tiverton &c. Co., 7
Lopez *v.* Burslam, 95
Lord *v.* Commissioners of Sydney, 445
—— *v.* Lee, 824, 830
Lorymer *v.* Hickson, 735
Losh *v.* Hague, 345
Lothian *v.* Henderson, 250
Love *v.* Pares, 556
Lovell *v.* Howell, 811
Lovelock *v.* Franklyn, 244
Lovick *v.* Crowder, 343
Low *v.* Little, 129
Lowry *v.* Bourdieu, 250, 674
Lowther *v.* Radnor (Earl of), 83
Lozano *v.* Janson, 543
Lozon *v.* Pryse, 145
Lubbock *v.* Potts, 674
Lucas *v.* Nockells, 664
—— *v.* Worswick, 251, 253

Lucy *v.* Levington, 856
—— *v.* Mouflet, 746
Lumley *v.* Dubourg, 118
—— *v.* Gye, 801, 900
—— *v.* Wagner, 895
Lunt *v.* London and North-Western R. C., 366
Lupton *v.* White, 279
Lyall *v.* Edwards, 601
Lygo *v.* Newbold, 264, 367
Lyle *v.* Richards, 97, 571, 630
Lyme Regis (The Mayor, &c., of) *v.* Henley, 197
Lyn *v.* Wynn, 24
Lynch *v.* Knight, 199, 200
—— *v.* Nurdin, 367, 368
Lyndon *v.* Stanbridge, 606
Lyon *v.* Reed, 654
Lyons *v.* De Pass, 765
—— *v.* Tucker, 341
Lysaght *v.* Bryant, 435
Lyth *v.* Ault, 703
Lythgoe *v.* Vernon, 161
Lyttleton *v.* Cross, 128, 900

M.

M'Call *v.* Taylor, 554
M'Callan *v.* Mortimer, 175, 675
M'Cance *v.* London and North Western R. C., 165
M'Carthy *v.* Decaix, 258, 259
M'Collin *v.* Gilpin, 572
M'Cormack *v.* Grogan, 49
M'Donnell *v.* White, 845
M'Dougal *v.* Robertson, 857
M'Gahey *v.* Alston, 899
M'Gregor *v.* Barrett, 122
—— *v.* Graves, 712
—— *v.* Low, 679
—— *v.* Topham, 901
M'Guire *v.* Scully, 608
M'Inne's patent (*In re*), 345
M'Intyre *v.* Belcher, 278
M'Kenna *v.* Pope, 85
M'Kenzie *v.* British Linen Co., 284
—— *v.* Heaketh, 730
M'Kinnon *v.* Penson, 198
M'Kune *v.* Joynson, 442
M'Lanahan *v.* Universal Insurance Co., 890
M'Laughlin *v.* Pryor, 809
M'Mahon *v.* Field, 220
—— *v.* Lennard, 899
M'Manus *v.* Bark, 700
—— *v.* Crickett, 804
M'Naughten's case, 887
M'Neill *v.* Reid, 243
M'Pherson *v.* Daniells, 309
M'Swiney *v.* Royal Exchange Ass. Co., 215
Macauley *v.* Furness Ry., 265
Macbeath *v.* Haldimand, 819
Macdonald *v.* Longbottom, 570, 572
MacDougal's patent (*in re*), 345
Macdougal *v.* Paterson, 23
Mace *v.* Cammel, 282
Macfarlane *v.* Taylor, 741
Machell *v.* Clarke, 437
Mackally's case, 17
Mackay *v.* Commercial Bank of New Brunswick, 803
—— *v.* Dick, 231
Mackenzie *v.* Sligo and Shannon R. C., 32
—— *v.* Dunlop, 879
Mackintosh *v.* Marshall, 750
—— *v.* Midland Counties R. C., 506
—— *v.* Trotter, 377
Maclae *v.* Sutherland, 581, 583, 823
Maclean *v.* Dunn, 825
Macrae *v.* Clarke, 192
Macrow *v.* Hull, 138
Mactaggart *v.* Watson, 659
Maddick *v.* Marshall, 789
Maddison *v.* Alderton, 718
Madeley *v.* Booth, 730
Madrazo *v.* Willes, 56
Magdalen College (case of), 69
Magee *v.* Atkinson, 620
—— *v.* Lovell, 576
Magnay *v.* Edwards, 505
Magrath *v.* Hardy, 900
Maitland *v.* Mackinnon, 533
Malcolmson *v.* O'Dea, 918
Malins *v.* Freeman, 273
Mallan *v.* May, 509, 695
—— *v.* Radloff, 617, 741

Malpas *v.* Clements, 899
—— *v.* London and South Western R. C., 838
Manby *v.* Bewicke, 846
—— *v.* Witt, 312
Manchester R. C., *app.*, Fullarton, *resp.*, 350
—— Sheffield, &c., Co. *v.* Brown, 646
Mandrel (*ex pte.*), 389, 448
Mangan *v.* Atterton, 367
Mangles *v.* Dixon, 441
Manley *v.* Boycot, 660, 838
—— *v.* St. Helen's Can. and R. C., 350
Mann *v.* Mann, 586
—— *v.* Pearson, 486
Manning *v.* Bailey, 396
—— *v.* Eastern Counties R. C., 904
Mansell *v.* Reg., 316
Mansergh (*in re*), 95
Mansfield (Earl of) *v.* Blackburne, 400, 402
Manson *v.* Thacker, 731
Manton *v.* Bales, 138
Manzoni *v.* Douglas, 299
Mapleback (*re*), 676
Mardall *v.* Thellusson, 860
Mare *v.* Charles, 499
Margetson *v.* Wright, 737
Marianna Flora (The), 361
Marine Ins. Co. *v.* Hardside, 898
Markham *v.* Stanford, 656
Marks *v.* Lahèe, 917
Marlborough (Duke of) *v.* Lord Godolphin, 126, 456
Marriott *v.* Hampton, 250
Marsden *v.* City and County Ass. Co., 211, 215
—— *v.* Moore, 506
—— *v.* Saville Street Foundry Co., 344
Marsh *v.* Higgins, 31
—— *v.* Keating, 206, 785
—— *v.* Loader, 308
Marshall, *app.*, Bown, *resp.*, 681
—— *v.* Berridge, 579
—— *v.* Broadhurst, 859
—— *v.* Lamb, 88
—— *v.* Lynn, 840, 841
Marshalsea case, 88
Marson *v.* Short, 246
Marston *v.* Downes, 896
Martin *v.* Andrews, 77
—— *v.* Great Northern R. C., 134
—— *v.* Hewson, 675
—— *v.* Lee, 512
—— *v.* Mackonochie, 16, 884
—— *v.* Morgan, 253
—— *v.* Pycroft, 562, 838
—— *v.* Read, 767
—— *v.* Reid, 442, 777
—— *v.* Roe, 393
—— *v.* Strachan, 668, 870
—— *v.* Temperley, 800
Martindale *v.* Booth, 283
—— *v.* Falkner, 248
—— *v.* Smith, 649
Martinez *v.* Gerber, 199
Martyn *v.* Clue, 443
—— *v.* Gray, 286
—— *v.* Williams, 443
Marzetti *v.* Williams, 193, 194
Mason *v.* Bradley, 149, 150
—— *v.* Hill, 356, 357
—— *v.* Keeling, 368
—— *v.* Mitchell, 685
—— *v.* Morley, 895
Massey *v.* Allen, 919
—— *v.* Goodall, 723
—— *v.* Johnson, 835
—— *v.* Sladen, 102
Master *v.* Miller, 79, 148, 149
Master's Clerk case, 796
Masters *v.* Ibberson, 688
—— *v.* Lewis, 160
Mather *v.* Fraser, 390, 393, 394, 395, 397, 398, 610
—— *v.* Maidstone (Lord), 692. 710
—— *v.* Thomas, 157
Matheson *v.* Kilburn, 825
Mathew *v.* Blackmore, 607, 610
Matthews *v.* Discount Corp., 196
—— *v.* Gibson, 159
Maugham *v.* Sharpe, 466, 579
Maxted *v.* Paine, 36, 882
May *v.* Burdett, 368
—— *v.* Chapman, 672
—— *v.* Seyler, 710
Mayer *v.* Harding, 245

Mayer *v.* Isaac, 552
Mays *v.* Cannell, 508
Mears *v.* London and South Western R. C., 372
Meath (Bishop of) *v.* Winchester (Marquis of), 96
Meddowcroft *v.* Huguenin, 908
Medina *v.* Stoughton, 759
Medway Navigation Co. *v.* Romney (Earl of), 196
Medwin (*ex pte.*), 110
—— *v.* Streeter, 828
Meeus *v.* Thellusson, 107
Melhado *v.* Porto, &c. Co., 826
Mellersh *v.* Rippen, 187
Mellish *v.* Richardson, 130
Mellors *v.* Shaw, 810, 815
Melville *v.* De Wolf, 244
—— *v.* Doidge, 350
Melville's (Lord) Trial, 893
Menhennet (*ex pte.*), 112
Merchant Shipping Co. *v.* Armitage, 581
Merchant Tailors' Co. *v.* Truscott, 27
Meriton *v.* Coombs, 413
Merrill *v.* Frame, 607
Merry *v.* Green, 337, 769
Merryweather *v.* Nixon, 682
Mersey Dock Board *v.* Penhallon, 361, 366, 818
Mersey Dock Trustees *v.* Gibbs, 115, 191, 361, 366, 818
Mersey Docks *v.* Cameron, 68
Messenger *v.* Andrews, 167, 665
Messent *v.* Reynolds, 607
Metropolitan Association *v.* Petch, 372
Metropolitan Asylum Bd. *v.* Hill, 6, 191
Metropolitan Board of Works *v.* McCarthy, 5
Metropolitan Board of Works *v.* Metropolitan R. C., 353
Metropolitan Counties Assurance Co. *v.* Brown, 398
Meux *v.* Jacobs, 297
Mews *v.* Carr, 778
Mexican and South American Co. (*re*), 923
Meyer *v.* Haworth, 716
Meyerstein *v.* Barber, 444
Michell *v.* Brown, 23, 24
Micklethwait *v.* Micklethwait, 533
Micklethwaite (*ex pte.*), 527
Middleton *v.* Barned, 901
—— *v.* Crofts, 23, 261
—— *v.* Melton, 915, 917
Midland Great Western R. C. *v.* Johnson, 256, 257
Midland Ins. Co. *v.* Smith, 155, 204, 767, 868
Midland R. C., *app.*, Pye, *resp.*, 34
Milbourn *v.* Ewart, 120
Mildmay's case, 421
Miles *v.* Bough, 117, 795
—— *v.* McIlwraith, 285
—— *v.* Schilizzi, 739
—— *v.* Williams, 117
Millar *v.* Taylor, 346
Millen *v.* Hawery, 296
Miller *v.* Knox, 453
—— *v.* Lawton, 453
—— *v.* Race, 768
—— *v.* Salomons, 36, 142
—— *v.* Tetherington, 881
—— *v.* Travers, 567, 568, 587, 588, 590
Milligan *v.* Wedge, 806, 819
Mills *v.* Alderbury Union, 251
—— *v.* Farmer, 522
—— *v.* Fowkes, 771, 772
—— *v* Gibson, 658
—— *v.* Ladbroke, 505
—— *v.* Wright, 537
Millward *v.* Littlewood, 703
Milne *v.* Bayle, 19
—— *v.* Leister, 919, 921
—— *v.* Marwood, 747
Milner *v.* Field, 329
—— *v.* Maclean, 414
Milnes *v.* Dawson, 466
—— *v.* Duncan, 252, 253
Minshall *v.* Lloyd, 390, 391, 399
Mirehouse *v.* Rennell, 143, 179
Mirfin *v.* Attwood, 26
Mitcalfe *v.* Westaway, 435
Mitchell *v.* Crassweller, 802
—— *v.* Darthez, 610, 613
—— *v.* Jenkins, 309
—— *v.* Newhall, 739
Mitcheson *v.* Nicol, 822
Mittelholzer *v.* Fullarton, 690

Mody *v.* Gregson, 617, 740, 742
Moens *v.* Heyworth, 744
Moffat *v.* Dixon, 792
—— *v.* Laurie, 618
—— *v.* Parsons, 779
Molineux *v.* Molineux, 632
Mollett *v.* Wackerbath, 149
Mollino and Co. *v.* Court of Wards, 785
Mollino, March, &c. *v.* Court of Wards, 640
Molton *v.* Camroux, 289
Monck *v.* Hilton, 548
Mondel *v.* Steel, 325, 615, 935
Money *v.* Jordan, 287
Monke *v.* Butler, 899
Montefiore *v.* Lloyd, 571, 576
Montefiori *v.* Montefiori, 692
Monypenny *v.* Deering, 521, 522
—— *v.* Monypenny, 607
Moon *v.* Durden, 30
—— *v.* Witney Union, 618
Moone *v.* Rose, 294
Moor *v.* Roberts, 117
—— *v.* Watts, 324
Moore (*ex pte.*), 133
—— *v.* Bushell, 707
—— *v.* Campbell, 842
—— *v.* M'Grath, 603
—— *v.* Phillips, 31
—— *v.* Rawlins, 600
Moorhouse *v.* Lord, 71
Moorsom *v.* Kymer, 613
Morant *v.* Chamberlain, 361
Moravia *v.* Sloper, 88, 906
Morden, *app.*, Porter, *resp.*, 301
Morgan (*ex pte.*), 133
—— *v.* Abergavenny (Earl of) 337
—— *v.* Bridges, 280
—— *v.* Couchman, 161, 287
—— *v.* Crawshay, 621
—— *v.* Evans, 746
—— *v.* Marquis, 427
—— *v.* Morris, 119
—— *v.* Nicholl, 327, 910
—— *v.* Ravey, 858, 866
—— *v.* Rowlands, 772
—— *v.* Seaward, 49, 510, 511
—— *v.* Thomas, 862
Morgan *v.* Vale of Neath R. C., 811
—— *v.* Whitmore, 897
Morley *v.* Attenborough, 733, 757, 759
—— *v.* Boothby, 840, 841
—— *v.* Grove, 265
Morrall *v.* Sutton, 539
Morrell *v.* Fisher, 584, 586, 587, 597
—— *v.* Frith, 98
—— *v.* Martin, 88
Morrice *v.* Langham, 415
Morris *v.* Blackman, 456
—— *v.* Cleasby, 781
—— *v.* Davis, 901
—— *v.* Edgington, 451
—— *v.* Matthews, 235
—— *v.* Morris, 381, 430
—— *v.* Ogden, 900
—— *v.* Parkinson, 83
—— *v.* Pugh, 129
—— *v.* Richards, 17
Morrish *v.* Murrey, 134, 412, 746
Morrison *v.* Chadwick, 654
—— *v.* Univ. Mar. Ins., 164
Morten *v.* Marshall, 656
Mortimer *v.* Cradock, 337, 893
—— *v.* Hartley, 546
—— *v.* South Wales R. C., 320
Mortimore *v.* Wright, 494
Morton, *app.*, Brammer, *resp.*, 140
—— *v.* Woods, 538
Moseley *v.* Motteux, 460, 500, 603
—— *v.* Simpson, 133
Moses *v.* Macfarlane, 77
Mosley *v.* Massey, 584
Moss *v.* Gallimore, 341
—— *v.* Hall, 702
Mostyn *v.* Coles, 139
—— *v.* Fabrigas, 81, 126
—— *v.* Mostyn, 590, 592
Moule *v.* Garrett, 661
Mounsey *v.* Ismay, 874
Mount *v.* Taylor, 26
Mountcashel (Earl of), *v.* Barber, 713, 823
Mountjoy *v.* Wood, 69
Mouse's case, 11
Moverley *v.* Lee, 643

Moyse *v.* Newington, 766
Muggleton *v.* Barnett, 338, 873
Muir *v.* City of Glasgow Bank, 552
Mulcahy *v.* Reg., 316
Mullett *v.* Mason, 221
Mullins *v.* Collins, 302
Mumford *v.* Hitchcocks, 17
—— *v.* Oxford, Worcester, and Wolverhampton R. C., 362, 372
Mummery *v.* Paul, 744, 747
Munday *v.* Stubbs, 88
Munn *v.* Baker, 553
Munro *v.* Munro, 482
Munroe *v.* Bordier, 710
Munt *v.* Stokes, 673
Murchie *v.* Black, 187
Murray *v.* Mace, 229
—— *v.* Mann, 744, 748, 752
—— *v.* Reg., 529
Myerhoff *v.* Freelich, 98

N.

Nadin *v.* Battie, 120
Napier *v.* Bruce, 534, 602
Nash *v.* Armstrong, 702
—— *v.* Lucas, 408
Natal Land, &c. Co. *v.* Good, 910
National Guaranteed Manure Co. *v.* Donald, 458
Naylor *v.* Palmer, 215
Nazer *v.* Wade, 119
Neat *v.* Harding, 761
Needham *v.* Bremner, 321, 910
Neilson (*ex pte.*), 682
—— *v.* Harford, 98, 509
Neilson's patent, 510
Nelson (Earl) *v.* Bridport (Lord), 892
—— *v.* Couch, 318
—— *v.* Liverpool Brewery Co., 817
Nerot *v.* Wallace, 243
Ness *v.* Angas, 165
Neve *v.* Hollands, 716
Newberry *v.* Colvin, 801
Newbould *v.* Coltman, 83
Newcastle (Corporation of) *v.* The Att.-Gen., 639
—— (Duke of) Settled Estates, 430
Newington Local Board *v.* Nottingham L. Co., 240
Newmarch *v.* Clay, 771
New South Wales (Att.-Gen. of) *v.* Macpherson, 583
Newton (*re*), 330
—— *v.* Belcher, 248
—— *v.* Boodle, 130, 236
—— *v.* Chantler, 304
—— *v.* Cowie, 142, 641
—— *v.* Cubitt, 667
—— *v.* Ellis, 804, 819
—— *v.* Grand Junction R. C., 345
—— *v.* Harland, 413
—— *v.* Holford, 620
—— *v.* Liddiard, 248
—— *v.* Lucas, 588
—— *v.* Ricketts, 611, 885
—— *v.* Rouse, 650
—— *v.* Vaucher, 345
Nichol *v.* Godts, 562
Nicholl *v.* Allen, 197
—— *v.* Nicholl, 522
Nichols *v.* Marsland, 225, 226
Nicholson *v.* Gooch, 678, 689
—— *v.* Lancashire & Yorkshire R. C., 366
—— *v.* Mounsey, 806
—— *v.* Paget, 552
—— *v.* Revill, 659
Nickels *v.* Atherstone, 285, 654
—— *v.* Ross, 49
Nicoll *v.* Chambers, 592
—— *v.* Glennie, 828
Nightingall *v.* Smith, 586
Nind *v.* Marshall, 602
Nitro-phosphate Co. *v.* St. Katherine's Docks Co., 224, 225
Nixon *v.* Freeman, 407
Noble *v.* National Discount Co., 703
—— *v.* Noble, 248
—— *v.* Ward, 841, 842, 843
Nokes's case, 607
Nordenstrom *v.* Pitt, 718
Norfolk (Duke of) *v.* Worthy, 781

Norris *v.* Baker, 373
—— *v.* Norris, 466
North (Lord) *v.* Ely (Bishop of), 533
—— *v.* London and S.-Western R. C., 273
—— *v.* Smith, 350
North British Insurance Co. *v.* Lloyd, 750, 753
—— British R. C. *v.* Tod, 629
—— Eastern R. C. *v.* Elliott, 187
—— Stafford Steel Co. *v.* Ward, 608
—— Western R. C. *v.* Whinray, 602
Northam *v.* Hurley, 196
Northumberland (Duke of) *v.* Errington, 536
Norton *v.* Powell, 18
Norwich *v.* Pearse, 928
Norwood *v.* Read, 860
Notman *v.* Anchor Ass. Co., 320, 552
Nott *v.* Shoolbred, 372
Nottidge *v.* Pritchard, 776
Novello *v.* Sudlow, 183
Nugent *v.* Smith, 224, 234
Nunn *v.* Varty, 872
Nuttall *v.* Bracewell, 358

O.

Oakeley *v.* Pasheller, 659
Oakes *v.* Turquand, 292
Oakley *v.* Portsmouth and Ryde Steam Packet Co., 224
Oates *v.* Hudson, 267
O'Brien *v.* Bryant, 310
—— *v.* Clement, 310
Ochsentein *v.* Papelier, 281
Ockford *v.* Freston, 290
O'Connell *v.* Reg., 136, 332
O'Conner *v.* Bradshaw, 674
O'Flaherty *v.* M'Dowell, 23, 527
Ogden *v.* Graham, 626
Ogle *v.* The Earl Vane, 843
Oglesby *v.* Yglesias, 783
Oldershaw *v.* King, 498
Oliver *v.* Fielding, 508
Ollerton (*re*), 111
Ollivant *v.* Bailey, 617, 741
Ollive *v.* Booker, 508
Onions *v.* Bowdler, 845
Onslow *v.* ——, 389
Organ *v.* Brodie, 453
Oriental Bank *v.* Wright, 4
Orme *v.* Broughton, 857
Ormerod *v.* Chadwick, 586
—— *v.* Todmorden Co., 80
Ormond *v.* Holland, 810, 815
Ormrod *v.* Huth, 733, 754
Osborn *v.* Gillett, 868
—— *v.* London Dock Co., 924
—— *v.* Wise, 451
Osborne's case, 642
Osborne *v.* Williams, 684
Osman *v.* Sheaf, 501
Ostler *v.* Cooke, 5, 88
O'Toole *v.* Browne, 466
Oulds *v.* Harrison, 466, 694
Outram *v.* Morewood, 322
Overton *v.* Harvey, 318
Owen *v.* Homan, 659
—— *v.* Smith, 637
—— *v.* Thomas, 580
Oxley *v.* Watts, 294

P.

Pacific Steam Navigation Co. *v.* Lewis, 616
Packer *v.* Gibbins, 228
Packington's case, 380
Paddock *v.* Forester, 634
—— *v.* Fradley, 671
Paddon *v.* Bartlett, 30
Padwick *v.* Knight, 872
Page *v.* Eduljee, 649
—— *v.* Moore, 135
Paget *v.* Foley, 27
—— *v.* Wilkinson, 758
Paine *v.* Patrick, 666
Painter *v.* Abel, 707
—— *v.* The Liverpool Gas Co., 84, 108
Palgrave *v.* Wyndham, 861
Palk *v.* Force, 634
Palmer *v.* Blackburn, 619
—— *v.* Evans, 820

Palmer *v.* Hutchinson, 55, 819
—— *v.* Johnson, 732
—— *v.* Moxon, 580
Panama Telegraph Co. *v.* India Rubber Works, 244
Pannell *v.* Mill, 461, 503
Panton *v.* Holland, 361
—— *v.* Williams, 100
Paradine *v.* Jane, 226, 228, 238
Parana (The), 201
Pardington *v.* South Wales R. C. 264
Pargeter *v.* Harris, 177
Paris *v.* Levy, 363
Parke *v.* Harris, 579
Parker *v.* Bristol and Exeter R. C., 267, 269, 271
—— *v.* Crouch, 30
—— *v.* Great Western R. C., 268, 271, 559
—— *v.* Green, 928
—— *v.* Ibbotson, 98
—— *v.* Kett, 797
—— *v.* Marchant, 588
—— *v.* Patrick, 766
—— *v.* Rolls, 433
—— *v.* Tootal, 513
—— *v.* Winlow, 783
Parkes *v.* Prescott, 821
—— *v.* Smith, 326
Parkhurst *v.* Smith, 503, 536
Parkinson *v.* Lee, 616, 733, 739, 740
Parmiter *v.* Coupland, 101, 311, 313
Parnaby *v.* Lancaster Canal Co., 366
Parrett Navigation Co. *v.* Robins, 559
Parrott *v.* Anderson, 778, 780
Parry *v.* Croydon Commercial Gas and Coke Co., 23
—— *v.* Jones, 16
—— *v.* Nicholson, 149, 150
Parsons *v.* Sexton, 617
—— *v.* St. Matthew's, Bethnal Green, 818
—— *v.* Thompson, 689
Parton *v.* Crofts, 822
Partridge *v.* Scott, 351
Pasley *v.* Freeman, 184, 736, 744
Patapsco Ins. Co. *v.* Coulter, 212
Patent Bottle Envelope Co. *v.* Seymer, 345
Paterson *v.* Gandasequi, 781
—— *v.* Wallace, 813
Patmore *v.* Colburn, 838
Patrick *v.* Colerick, 295
—— *v.* Reynolds, 791
Patten *v.* Rea, 802
Pattison *v.* Jones, 312
Paull *v.* Simpson, 274
Pawle *v.* Gunn, 713
Pawson *v.* Watson, 755
Paxton *v.* Popham, 680, 688
Payler *v.* Homersham, 534, 600
Payne *v.* Burridge, 267
—— *v.* Meller, 234
—— *v.* New South Wales, &c., Steam Nav. Co., 720
Payntor *v.* Williams, 714
Peaceable *v.* Watson, 717
Peachey *v.* Rowland, 804
Peacock *v.* Bell, 907
—— *v.* Stockford, 637
Peake *v.* Screech, 636
Pearce *v.* Brooks, 693
Peardon *v.* Underhill, 601
Pearson *v.* Cox, 299
—— *v.* Dawson, 161
—— *v.* Hull Local Board of Health, 547
—— *v.* Lemaitre, 514
—— *v.* Spencer, 447, 452
Pease *v.* Chayter, 81, 84, 324
—— *v.* Gloahec, 440
Peate *v.* Dicken, 17, 706
Pedley *v.* Davis, 83, 84
—— *v.* Goddard, 580
Peek *v.* Gurney, 223
—— *v.* North Staffordshire R. C., 880
Peer *v.* Humphrey, 761, 766
Peers *v.* Lambert, 730
Pell *v.* Linnell, 236
Pemberton *v.* Chapman, 862
—— *v.* Oakes, 774
Pennell *v.* Deffell, 774
—— *v.* Reynolds, 304
Penney *v.* Slade, 160
Penny (*re*), 188
—— *v.* Brice, 855
—— *v.* Innes, 329
Penrose *v.* Martyn, 499

Penruddocke's case, 351, 372
Penton *v.* Browne, 410, 412
—— *v.* Robart, 400, 432
Peppercorn *v.* Hofman, 92
—— *v.* Peacock, 637
Percival *v.* Hughes, 352, 807
—— *v.* Nanson, 916
—— *v.* Oldacre, 747
—— *v.* Stamp, 294, 408, 411
Perkins *v.* Eade, 730
—— *v.* Smith, 798
Perkinson *v.* Guildford, 860
Perren *v.* Monmouthshire Railway and Canal Co., 234, 350
Perrin *v.* Blake, 423
Perrott *v.* Palmer, 378
Perry *v.* Attwood, 842
—— *v.* Davis, 134
—— *v.* Fitzhowe, 274, 413
—— *v.* Skinner, 540
—— *v.* Watts, 502
Perth Peerage (The), 892
Peshall *v.* Layton, 793
Petch *v.* Lyon, 287
—— *v.* Tutin, 509
Peter *v.* Daniel, 499
Peters *v.* Clarson, 293
Peto *v.* Blades, 758
Petrie *v.* Hannay, 689
—— *v.* Nuttall, 911
Pettamberdass *v.* Thackoorseydas, 30
Pettitt *v.* Mitchell, 618
Peytoe's case, 834
Peyton *v.* London (Mayor, &c., of), 352
Phené *v.* Popplewell, 654
Pheysey *v.* Vicary, 450
Philips *v.* Barber, 543
Philipson *v.* Egremont (Earl of), 691
Phillips *v.* Ball, 875
—— *v.* Edwards, 553
—— *v.* Eyre, 29, 35, 81, 116, 332
—— *v.* Humphrey, 867
—— *v.* Innes, 18
—— *v.* Nairne, 212, 215
—— *v.* Naylor, 190
—— *v.* Phillips, 263, 339, 428
—— *v.* Smith, 369
Philpott *v.* Jones, 773
Philpott *v.* Kelly, 855
—— *v.* St. George's Hospital, 681
Philpotts *v.* Philpotts, 681
Phipps *v.* Ackers, 135
Phipson *v.* Harvett, 22
Piatt *v.* Ashley, 636
Pickard *v.* Sears, 284, 286
—— *v.* Smith, 804, 807
Pickering *v.* Dowson, 747
—— *v.* Ilfracombe R. C., 696
—— *v.* Rudd, 373
Pickford *v.* Grand Junction R. C., 271, 780
Pidgeon *v.* Burslem, 694
Piers *v.* Piers, 470, 901
Piggot *v.* Eastern Counties R. C., 202, 349
Pigot *v.* Cubley, 767
Pigot's case, 148, 695
Pike *v.* Carter, 83
—— *v.* Hoare, 178
Pilbrow *v.* Pilbrow's Atmospheric R. C., 697
Pilgrim *v.* Southampton and Dorchester R. C., 6
Pilkington *v.* Cooke, 25
Pillans *v.* Van Mierop, 699
Pilmore *v.* Hood, 744, 746, 747
Pim *v.* Curell, 912
Pindar *v.* Ainsley, 228
—— *v.* Wadsworth, 140, 195
Pinel's case, 843
Pinhorn *v.* Souster, 30
Pinington *v.* Galland, 447
Pitcher *v.* King, 83
Pitt *v.* Coombes, 272
—— *v.* Pitt, 667
Place *v.* Potts, 318
Plant *v.* Taylor, 915
Plasterers' Co. *v.* Parish Clerks' Co., 364
Plate Glass Co. *v.* Meredith, 6
Platt *v.* Bromage, 250
Playford *v.* United Kingdom Telegraph Co., 706
Plenty *v.* West, 466, 539
Plevins *v.* Downing, 841
Plimpton *v.* Malcolmson, 511
Plumer *v.* Briscoe, 894
Pochen *v.* Duncombe, 641
Pocock *v.* Pickering, 529

Polden *v.* Bastard, 447
Pole *v.* Cetcovitch, 240
—— *v.* Harrobin, 688
Polhill *v.* Walter, 748, 782, 784
Polini *v.* Grey, 919
Pollard (*in re*), 108
—— *v.* Bank of England, 252
—— *v.* Ogden, 777
Pollen *v.* Brewer, 413
Pollitt *v.* Forest, 579
Pollock *v.* Stables, 882
Pomfret *v.* Ricroft, 449
Pontifex *v.* Bignold, 196, 744
—— *v.* Midland R. C., 194
—— *v.* Wilkinson, 840
Poole *v.* Dicas, 919
—— *v.* (Mayor of) *v.* Whitt, 277
—— *v.* Poole, 532
—— *v.* Tunbridge, 835
—— *v.* Whitcombe, 139, 248
Pooley *v.* Brown, 247, 740
—— *v.* Driver, 284, 785
—— *v.* Harradine, 660, 839
Pope *v.* Bavidge, 263
—— *v.* Fleming, 289
Popplewell *v.* Hodkinson, 187, 354
Pordage *v.* Cole, 506, 624
Porter *v.* Bradley, 153
Portington's case, 418, 422
Portland (Duke of) *v.* Topham, 456
Portsmouth Floating Bridge Co. *v.* Nance, 557
Potez *v.* Glossop, 897
Pothoneir *v.* Dawson, 767
Potter *v.* Faulkner, 264, 350, 366, 815
Poulsum *v.* Thirst, 94
Poulton *v.* London and South-Western R. C., 781, 799
Powell, *app.*, Borraston, *resp.*, 400
—— *v.* Barham, 736
—— *v.* Divett, 149
—— *v.* Edmunds, 615
—— *v.* Elliott, 730
—— *v.* Fall, 191
—— *v.* Farmer, 400
—— *v.* Graham, 859
—— *v.* Gudgeon, 414
—— *v.* Hoyland, 272
Powell *v.* Rees, 865
—— *v.* Sonnett, 899
Power *v.* Barham, 758, 739
Powlett *v.* Boulton, 379
Powley *v.* Walker, 723
Pownall *v.* Ferrand, 713
Prehn *v.* Royal Bank of Liverpool, 220
Prentice *v.* Harrison, 88
—— *v.* London Building Society, 163
Preston *v.* Liverpool and Manchester R. C., 690
—— *v.* Merceau, 614
—— *v.* Norfolk R. C., 194
—— *v.* Peeke, 320
Pretty *v.* Bickmore, 817
Price *v.* Barker, 534, 659
—— *v.* Carter, 287
—— *v.* Easton, 703
—— *v.* Great Western R. C., 609
—— *v.* Green, 695
—— *v.* Kirkham, 658
—— *v.* Macaulay, 738
—— *v.* Messenger, 92
—— *v.* Peek, 793
—— *v.* Seaman, 475
—— *v.* Torrington (Earl of), 918
—— *v.* Wodehouse, 294, 295
—— *v.* Worwood, 457, 897
Prichard *v.* Powell, 154
Prideaux *v.* Bunnett, 616, 617
Priestley *v.* Foulds, 557
—— *v.* Fowler, 745, 810
Priestly *v.* Fernie, 330
Prince *v.* Clarke, 824
—— *v.* Nicholson, 631
Prior *v.* Hembrow, 859
Pritchard *v.* Merchants' Life Insurance Co., 254
Pritchett *v.* Smart, 924
Proctor *v.* Hodgson, 447, 451
—— *v.* Mainwaring, 528
Prohibitions (The case of), 42, 110
Prole *v.* Wiggins, 688
Prosser *v.* Wagner, 912
Proudfoot *v.* Montefiore, 799
Prowse *v.* Loxdale, 327
Prudential Insurance Co. *v.* Edmunds, 104
Pryce *v.* Belcher, 184

Pugh *v.* Griffith, 410
—— *v.* Stringfield, 499, 505
Pulsford *v.* Richards, 728
Purchase *v.* Shallis, 586
Purnell, *app.*, Wolverhampton New Waterworks Co., *resp.*, 23
Pusey *v.* Desbouverie, 159, 258
Pyer *v.* Carter, 447
Pym *v.* Campbell, 620
—— *v.* Great Northern R. C., 864
Pyne (*re*), 160
—— *v.* Dor, 380

Q.

Quarman *v.* Burnett, 800, 809, 819
Quick *v.* Ludborrow, 859
Quicke *v.* Leach, 514
Quilter *v.* Mapleson, 29
Quincey (*ex pte.*), 394
—— *v.* Sharpe, 98

R.

Rackham *v.* Marriott, 98
Raffles *v.* Nichelhaus, 561
Railton *v.* Matthews, 753
Rainforth (*re*), Gwyne *v.* Gwyne, 772
Ralston *v.* Hamilton, 143, 518
Ramazotti *v.* Bowring, 286, 781
Rameshur Pershad Narain Singh *v.* Koorj Behari Pattuck, 359
Ramsden *v.* Dyson, 132, 167, 284, 378
Ramshay (*ex pte.*), 108
Rand *v.* Green, 592
Randall *v.* Newson, 235
—— *v.* Roper, 221
Randell *v.* Trimen, 748, 785
Ranger *v.* Great Western R. C., 112, 304
Ranklin *v.* Scott, 340
Rann *v.* Hughes, 700
Raphael *v.* The Bank of England, 671
—— *v.* Goodman, 793
Rapson *v.* Cubitt, 806, 819
Rashleigh *v.* South Eastern R. C., 505, 607
Ratcliffe *v.* Burton, 409
Rawlings *v.* Bell, 749, 755
Rawlins *v.* Ellis, 22
—— *v.* Wickham, 728
Rawson *v.* Haigh, 922
Rawstron *v.* Taylor, 189, 356
Ray *v.* Jones, 502
Raymond *v.* Fitch, 856, 857
Rayner *v.* Grote, 288, 583
Rea *v.* Sheward, 296
Read *v.* Edwards, 368
—— *v.* Great Eastern R. C., 864
—— *v.* Legard, 494
Reade *v.* Conquest, 315
Readhead *v.* Midland R. C., 864, 234, 235, 741
Reason *v.* Wirdnam, 711
Reay *v.* Richardson, 838
Rebeckah (The), 560
Redgrave *v.* Hurd, 729, 732
Redman *v.* Wilson, 212
Redmond *v.* Smith, 644
Reed *v.* Ingham, 547
—— *v.* Jackson, 321, 900
—— *v.* Lamb, 897
Reese River Silver Mining Co. *v.* Smith, 686, 697, 756
Reeve *v.* Palmer, 358
—— *v.* Whitmore, 466
Reeves *v.* Hearne, 716
Reg. *v.* Abbott, 206
—— *v.* Aberdare Canal Co., 113
—— *v.* Alleyne, 688
—— *v.* Ambergate, &c., R. C., 239, 909
—— *v.* Anderson, 94
—— *v.* Aspinall, 174
—— *v.* Austin, 67
—— *v.* Bamber, 225
—— *v.* Beadle, 69
—— *v.* Bennett, 223
—— *v.* Bertrand, 104
—— *v.* Betts, 49, 140, 361
—— *v.* Bird, 330
—— *v.* Birmingham (Inhabit. of), 658
—— *v.* Birmingham (Overseers of), 915
—— *v.* Bishop, 303
—— *v.* Blake, 922
—— *v.* Blakemore, 688

Reg. v. Bolton, 88
—— v. Boys, 923
—— v. Bradford Navigation Co., 362
—— v. Brennan, 900
—— v. Brighton (Inhabit. of), 468
—— v. Brimilow, 310
—— v. Brittleton, 928
—— v. Broadhempston (Inhabit. of), 499, 899
—— v. Brown, 636
—— v. Bryan, 206
—— v. Burgon, 206
—— v. Button, 330
—— v. Caledonian R. C., 241, 620, 629
—— v. Cambridge (The Recorder of), 113
—— v. Canterbury (Archbishop of), 107, 639, 834
—— v. Casterton (Inhabit. of), 637
—— v. Chadwick, 478
—— v. Chapman, 90
—— v. Charlesworth, 140, 332
—— v. Cheeseman, 306
—— v. Cheltenham Commissioners, 114
—— v. Christchurch (Inhabit. of), 32
—— v. Cleworth, 606
—— v. Coaks, 239
—— v. Collins, 306, 308
—— v. Combs, 658
—— v. Cresswell, 901
—— v. Cross, 925
—— v. Darlington Board of Health, 192
—— v. Deal (Mayor of), 113
—— v. Deane, 24
—— v. Deeley, 928
—— v. Denbighshire (The Justices of), 130
—— v. Denton (Inhabit. of), 25, 39
—— v. Drury, 331, 332
—— v. Dulwich College, 638, 794
—— v. Eagleton, 206, 307
—— v. East Mark, 62
—— v. Eastern Archipelago Co., 608
Reg. v. Edmundson, 606
—— v. Edwards, 67, 128, 236
—— v. Eldershaw, 310
—— v. Ellis, 166
—— v. Elrington, 332
—— v. Essex, 899
—— v. Essex (Commissioners of Sewers), 225
—— v. Evans, 161
—— v. Exeter, 915
—— v. Exeter (Chapter of), 900
—— v. Fisher, 305
—— v. Fontaine Moreau, 909
—— v. Fordingbridge (Inhabit. of), 899
—— v. Gardner, 224, 307
—— v. Garrett, 308
—— v. Gate Fulford (Inhabit. of), 904
—— v. Gaunt, 330
—— v. Gibbon, 114
—— v. Gillyard, 105, 926
—— v. Glynne, 332
—— v. Gompertz, 332
—— v. Goodall, 582
—— v. Goss, 206
—— v. Grant, 83
—— v. Great Western R. C., 111, 239
—— v. Great Yarmouth (J.J.), 113, 114
—— v. Green, 332
—— v. Gregory, 625
—— v. Groombridge, 310
—— v. Handsley, 114
—— v. Hapgood, 306
—— v. Hardey, 688
—— v. Hertfordshire (Justices of), 114
—— v. Hicklin, 301, 304
—— v. Hickling (Inhabit. of), 83
—— v. Hill, 304
—— v. Hodgkiss, 171
—— v. Hughes, 224, 883
—— v. Huntingdon, 114
—— v. Jones, 224, 796, 901
—— v. Jordan, 320
—— v. Keighley, 206
—— v. Kenrick, 206
—— v. Kirkman, 305

Reg. *v.* Knight, 330
—— *v.* Lancashire and Yorkshire R. C, 239
—— *v.* Lee, 114, 206, 392
—— *v.* Leeds and Bradford R. C., 34
—— *v.* Leicestershire (The Justices of), 235
—— *v.* Leigh, 226
—— *v.* Lewis, 94
—— *v.* London and North Western R. C., 239
—— *v.* London (Justices of), 115
—— *v.* London (Mayor of), 22, 23
—— *v.* Lovett, 304
—— *v.* Lowe, 160
—— *v.* M'Cann, 68
—— *v.* M'Pherson, 306
—— *v.* Machin, 330
—— *v.* Madeley (Inhabitants of), 30
—— *v.* Maidenhead (Mayor of), 79
—— *v.* Manchester and Sheffield R. C., 113
—— *v.* Manwaring, 470
—— *v.* Martin, 224, 307
—— *v.* Mellor, 593
—— *v.* Metropolitan Board of Works, 200
—— *v.* Middlesex (Registrar of), 629
—— *v.* Milledge, 114
—— *v.* Millis, 136, 468, 469, 470, 526
—— *v.* Moah, 330
—— *v.* Moore, 305
—— *v.* Morris, 331, 335
—— *v.* Murphy, 104
—— *v.* Myers, 113, 114
—— *v.* Newborough (Lord), 175
—— *v.* Newmarket R. C., 8, 794
—— *v.* Oxley, 582
—— *v.* Parker, 583
—— *v.* Paty, 908
—— *v.* Payne, 928
—— *v.* Peel, 592
—— *v.* Perkin, 796
—— *v.* Philips, 310
—— *v.* Pocock, 224
Reg. *v.* Povey, 892
—— *v.* Powell, 900
—— *v.* Prince, 303, 320
—— *v.* Ragg, 206
—— *v.* Rand, 111, 113
—— *v.* Regent's Canal Co., 629
—— *v.* Rew, 224
—— *v.* Riley, 307
—— *v.* Roberts, 307
—— *v.* Robinson, 925
—— *v.* Rochester (Dean of), 111
—— *v.* Roebuck, 206
—— *v.* Rotherham, 582
—— *v.* Russell, 140, 928
—— *v.* Saddlers' Co., 107, 289
—— *v.* Sandwich (The Mayor of), 287
—— *v.* Scott, 925
—— *v.* Sharpe, 15
—— *v.* Sherwood, 206
—— *v.* Silkstone, 582, 905
—— *v.* Skeen, 925
—— *v.* Smith, 314
—— *v.* South-Eastern R. C., 239
—— *v.* St. Albans (Bishop of), 112, 116
—— *v.* St. Edmund's, Salisbury, 22, 24
—— *v.* St. Margaret's, Westminster, 636
—— *v.* St. Mary Magdalen, 899
—— *v.* St. Marylebone, 698
—— *v.* St. Mary's, Warwick, 138, 919
—— *v.* St. Mary's, Whitechapel, 31
—— *v.* St. Michael's, Southampton, 900
—— *v.* St. Paul's, Covent Garden, 899
—— *v.* Stainer, 645
—— *v.* Stainforth (Inhabitants of), 91
—— *v.* Stephens, 821
—— *v.* Stoke-upon-Trent, 618
—— *v.* Strahan, 926
—— *v.* Stretfield, 586
—— *v.* Suffolk (Justices of), 24, 118
—— *v.* Surrey (Justices of), 115, 245
—— *v.* Sussex (Justices of), 135

Reg. *v.* Taylor, 171
—— *v.* Tewkesbury (Mayor of), 248
—— *v.* Thomas, 301, 305
—— *v.* Thompson, 928
—— *v.* Tooley, 90
—— *v.* Totness (Inhabitants of), 91, 109, 905
—— *v.* Train, 197
—— *v.* Treasury (Commrs.), 203
—— *v.* Upton St. Leonard's, 115
—— *v.* Vaughan, 200
—— *v.* Walcot (Overseers of), 156
—— *v.* Warwickshire (Justices of), 899
—— *v.* Waverton, 631
—— *v.* West Riding (Justices of), 114
—— *v.* Whiteley, 17
—— *v.* Widdop, 134
—— *v.* Wilcock, 586
—— *v.* Woodrow, 143, 301
—— *v.* Woodward, 830
—— *v.* Wooldale (Inhabitants of) 571, 580, 642
—— *v.* Worth (Inhabitants of), 919
—— *v.* York and North Midland R. C., 239
—— *v.* York, Newcastle, and Berwick R. C., 239
Reid *v.* Hoskins, 240, 244
Reis *v.* Scottish Equitable Life Assurance Society, 838
Remfry *v.* Butler, 268
Rennell *v.* Lincoln (Bishop of), 844
Rennie *v.* Clarke, 791
—— *v.* Ritchie, 426
Reuss *v.* Picksley, 841
Revis *v.* Smith, 190
Rew *v.* Barber, 757
Reward (The), 140, 694
Rex *v.* All Saints, Southampton, 905
—— *v.* All Saints, Worcester, 924
—— *v.* Amery, 60
—— *v.* Antrobus, 13
—— *v.* Aslett, 24, 27
—— *v.* Bailey, 262
—— *v.* Bellringer, 884
—— *v.* Benn, 107
Rex *v.* Birchenough, 330
—— *v.* Birmingham, 477
—— *v.* Butler, 48
—— *v.* Cambridge (University of), 107, 108
—— *v.* Carlisle, 321
—— *v.* Chester (Bishop of), 156
—— *v.* Chilverscoton, 171, 637, 905
—— *v.* Claviger, 924
—— *v.* Cotton, 67
—— *v.* Croke, 5
—— *v.* Crutchley, 10
—— *v.* Cunningham, 623
—— *v.* Davie, 638
—— *v.* Davis, 25
—— *v.* Dixon, 304
—— *v.* Eriswell, 135
—— *v.* Esopp, 262
—— *v.* Farrington, 304
—— *v.* Fillongley, 698
—— *v.* Garbet, 923
—— *v.* Hall, 531, 643
—— *v.* Halliday, 924
—— *v.* Harvey, 304, 309
—— *v.* Haslingfield, 904
—— *v.* Hellings, 905
—— *v.* Holm, 905
—— *v.* Hoseason, 110
—— *v.* Hulcott, 905
—— *v.* Jarvis, 633, 635
—— *v.* Johnson, 74, 84, 530
—— *v.* Jones, 301
—— *v.* Kempe, 47
—— *v.* Larking, 67
—— *v.* London (Bishop of), 246
—— *v.* London (Mayor of), 560
—— *v.* Loxdale, 176
—— *v.* Lyme Regis, 900
—— *v.* Mahon, 332
—— *v.* Marsh, 301
—— *v.* Mashiter, 638
—— *v.* McGrowther, 10
—— *v.* Middlesex (Justices of), 27
—— *v.* Moore, 304
—— *v.* North Nibley, 620
—— *v.* Nottingham Waterworks Co., 900
—— *v.* Osbourne, 638
—— *v.* Otley (Inhabitants of), 393
—— *v.* Owen, 309
—— *v.* Poole, 105

Rex *v.* Poor Law Commsrs., 540
—— *v.* Richards, 637
—— *v.* Robinson, 530
—— *v.* Sainsbury, 301
—— *v.* Scofield, 306
—— *v.* Scully, 406
—— *v.* Sloper, 66
—— *v.* Somerset (Com. of Sewers), 225
—— *v.* Southerton, 124
—— *v.* St. Dunstan, 395
—— *v.* St. Mary's, Leicester, 637
—— *v.* St. Pancras, 319
—— *v.* Stockton, 899
—— *v.* Upton Gray, 171
—— *v.* Vandercomb, 330
—— *v.* Verelst, 899
—— *v.* Walters, 305
—— *v.* Ward, 197, 361
—— *v.* Watson, 101
—— *v.* Westwood, 451
—— *v.* Whitchurch, 171
—— *v.* Whitnash (Inhabitants of), 17
—— *v.* Wilkes, 79, 407
—— *v.* Williams, 75
—— *v.* Woodfall, 301
—— *v.* Wright, 69, 70
—— *v.* Yarborough (Lord), 158
—— *v.* Younger, 17
Reynell *v.* Lewis, 788
—— *v.* Sprye, 683, 686, 738
Reynolds (*re*), 923
—— (*ex pte.*) 925
—— *v.* Barford, 551
—— *v.* Clarke, 373
—— *v.* Fenton, 107
—— *v.* Wheeler, 713
Rhodes *v.* Forwood, 278
—— *v.* Haigh, 857
—— *v.* Smethurst, 855
Ribble Navigation Co. *v.* Hargreaves, 557
Ricard *v.* Williams, 902
Ricardo *v.* Garcias, 324
Rice *v.* Shepherd, 494
Rich *v.* Basterfield, 816
—— *v.* Jackson, 614
Richards *v.* Bluck, 535
—— *v.* Davies, 517, 520
—— *v.* Dyke, 24
—— *v.* Harper, 187
Richards *v.* James, 343
—— *v.* M'Bride, 531
—— *v.* Morgan, 900
—— *v.* Rose, 187, 353, 447
Richardson *v.* G. E. R., 234
—— *v.* Dubois, 494
—— *v.* Dunn, 746
—— *v.* Mellish, 674, 518
—— *v.* Power, 513
—— *v.* Watson, 565, 567
Richmond *v.* Nicholson, 865
—— R. C. *v.* Louisa R. C., 449
Rickards *v.* Murdock, 889
Rickett *v.* Metropolitan R. C., 200, 392
Ricketts *v.* Bennett, 792
—— *v.* Weaver, 857
Riddell *v.* Sutton, 860
Ridgway *v.* Wharton, 629, 826
Riding *v.* Smith, 196
Ridley *v.* Gyde, 922
Rigby *v.* Great Western R. C., 504
Rigg *v.* Burbidge, 325
—— *v.* Lonsdale (Earl of), 336
Right *v.* Compton, 544
Riley *v.* Baxendale, 813
—— *v.* Packington, 789
Ring *v.* Roxburgh, 583
Ringer *v.* Cann, 611
Rippinghall *v.* Lloyd, 834
Risbourg *v.* Bruckner, 782
Riseley *v.* Ryle, 124
Rishton *v.* Cobb, 588
Risney *v.* Selby, 738
Ritchie *v.* Atkinson, 508
—— *v.* Smith, 686, 695
Rivers *v.* Griffiths, 168
Rix *v.* Borton, 22
Rizzi *v.* Foletti, 118
Robarts *v.* Tucker, 768
Robbins *v.* Fennell, 707
Roberts *v.* Aulton, 77
—— *v.* Barker, 359
—— *v.* Bethell, 896
—— *v.* Brett, 506
—— *v.* Bury Commsrs., 241
—— *v.* Great Western R. C., 350
—— *v.* Orchard, 94
—— *v.* Phillips, 611
—— *v.* Preston, 820

Roberts *v.* Rose, 363
—— *v.* Shaw, 774
—— *v.* Smith, 350, 709, 815
Robertson *v.* Fleming, 709
—— *v.* French, 512, 880
—— *v.* Gantlett, 447
—— *v.* Powell, 513
Robinson *v.* Anderton, 758
—— *v.* Bristol (Marquis of), 584
—— *v.* Collingwood, 906
—— *v.* Cotterell, 39
—— *v.* Davison, 230, 339
—— *v.* Emerson, 25
—— *v.* Gleadow, 782, 824
—— *v.* Hardcastle, 521
—— *v.* Mollett, 882
—— *v.* Reynolds, 710
—— *v.* Rutter, 761
Robson *v.* Att-Gen., 336
Rochdale Canal Co. *v.* King, 184
Roddy *v.* Fitzgerald, 520, 549, 605, 609
Roden *v.* Small Arms Co., 572
Rodger *v.* The Comptoir d'Escompte de Paris, 441, 556
Rodgers *v.* Maw, 823
—— *v.* Nowill, 748
—— *v.* Parker, 294
Roe *d.* Allport *v.* Bacon, 632
——*d.* Berkeley (Earl of) *v.* York (Archbishop of), 501
——*d.* Haldane *v.* Harvey, 894
——*d.* Hunter *v.* Galliers, 433
——*d.* Reade *v.* Reade, 544
——*v.* Bacon, 634
——*v.* Birkenhead, Lancashire, and Cheshire R. C., 799, 828
——*v.* Harrison, 834
——*v.* Lidwell, 535
——*v.* Tranmarr, 501
Roffey *v.* Henderson, 399, 840
Rogers *v.* Brenton, 872
—— *v.* Hadley, 99, 165, 620, 646, 691, 881
—— *v.* Ingham, 257
—— *v.* Nowill, 195
—— *v.* Parker, 196
—— *v.* Rajendoo Dutt, 56, 184, 188
—— *v.* Rogers, 263
Rogers *v.* Taylor, 187, 450, 872, 876
—— *v.* Vandercomb, 118
Rolfe *v.* Flower, 775
Rolin *v.* Steward, 193, 196
Rollason *v.* Leon, 503
Rolls *v.* Rock, 380
Rooke's case, 79
Rooke *v.* Kensington (Lord), 604
Roope *v.* D'Avigdor, 155, 205, 868
Roret *v.* Lewis, 124
Roscorla *v.* Thomas, 712, 714
Rose *v.* Groves, 197, 198
—— *v.* Miles, 197
—— *v.* Poulton, 210
Rosewarne *v.* Billing, 679, 694
Ross *v.* Adcock, 870
—— *v.* Hill, 234, 366
Rosse (The Earl of) *v.* Wainman, 400
Rossiter *v.* Trafalgar Life Assurance Association, 796
Rothes *v.* Kirkcaldy, &c., 526
Routledge *v.* Low, 346, 347
Rowbotham *v.* Wilson, 187, 353, 354, 432, 447, 647
Rowe *v.* Brenton, 916
Rowles *v.* Senior, 124
Royal Liver Friendly Society (*Re*), 537
Rumsey *v.* North-Eastern R. C., 274, 656
Rusden *v.* Pope, 464
Russell (*ex pte.*) 702
—— *v.* Bryant, 302
—— *v.* Da Bandiera, 241
—— *v.* Devon (Men of), 198
—— *v.* Ledsam, 634
—— *v.* New York (Mayor of), 2
—— *v.* Smyth, 76
—— *v.* Thornton, 750
Russia Steam Navigation Co., *v.* Silva, 880
Rust *v.* Nottidge, 505
Rustomjee *v.* Reg., 58
Rutland *v.* Doe *d.* Wythe, 434
—— *v.* Rutland, 861
Rutland's (Countess of) case, 122, 833

Rutland's (Earl of) case, 60
Rutter *v.* Chapman, 502, 796
Ruttinger *v.* Temple, 494
Ryall *v.* Rolle, 396, 444
Ryan *v.* Shilcock, 407
Ryder *v.* Mills, 527, 528
—— *v.* Wombwell, 103, 493
Rylands *v.* Fletcher, 349, 354, 355, 356, 366
—— *v.* Kreitman, 168
Ryves *v.* Wellington (The Duke of), 53

S.

Sack *v.* Ford, 801
Sadler *v.* Dixon, 219
—— *v.* Henlock, 704
—— *v.* Leigh, 781
—— *v.* Smith, 674
Saint *v.* Pilley, 166, 402
St. Margaret's Burial Board *v.* Thompson, 37
St. Pancras *v.* Batterbury, 185
St. Victor *v.* Devereux, 133
Salford (Mayor of) *v.* Ackers, 635
Salisbury (Marquis of) *v.* Gladstone, 432, 874
—— —— *v.* Great Northern R. C., 746
Salkeld *v.* Johnson, 525, 529, 530, 640
Salmon *v.* Webb, 909
Salomons *v.* Pender, 165
Salter's Co., *v.* Jay, 27
Sammell *v.* Wright, 809
Sampson *v.* Easterby, 534
Samuel *v.* Green, 780
Samuell *v.* Howorth, 660
Sanchar's (Lord) case, 105
Sandeman *v.* Scurr, 801
Sanders *v.* Coward, 241
—— *v.* Powell, 759
Sanderson *v.* Dobson, 545
—— *v.* Symonds, 150
Sandilands (*re*), 898
Sandilands *v.* Marsh, 785
Sandon *v.* Jarvis, 408
—— *v.* Proctor, 130
Sandrey *v.* Mitchell, 442
Sands *v.* Child, 798
Sansom *v.* Bell, 602
Sanson *v.* Rumsay, 893
Santos *v.* Illidge, 690
Sargent *v.* Gannon, 248
—— *v.* Morris, 781
—— *v.* Wedlake, 686
Sarquy *v.* Hobson, 214
Sasty Velaider *v.* Sembecutty, &c., 901
Saul *v.* Jones, 148
Saunders' case, 448
Saunders *v.* Evans, 609
—— *v.* Graham, 168
—— *v.* Smith, 373
Saunderson *v.* Griffiths, 823
—— *v.* Piper, 564
Savery *v.* King, 826
Savin *v.* Hoylake, 646
Saye and Sele Peerage (The), 901
Sayer *v.* Wagstaff, 777
Scales *v.* Cheese, 129
Scarbórough *v.* Borman, 425
—— (Earl of) *v.* Doe *d.* Savile, 513
Scarfe *v.* Morgan, 17
Scarpillinli *v.* Atcheson, 714
Scattergood *v.* Sylvester, 765
Schilizzi *v.* Derry, 240
Schmaling *v.* Tomlinson, 795
Schmaltz *v.* Avery, 288
Schofield (*ex pte.*), 925
Schooner Reeside (The), 885
Schuster *v.* M'Kellar, 801
Scotson *v.* Pegg, 903
Scott *v.* Avery, 537, 626, 651, 696
—— *v.* Littledale, 256
—— *v.* London Dock Co., 298
—— *v.* Manchester (Mayor of), 85
—— *v.* Scott, 338, 809
—— *v.* Seymour (Lord), 332
—— *v.* Shepherd, 201, 349
—— *v.* Stansfeld, 81, 311
—— *v.* Waithman, 894
Scrimshire *v.* Alderton, 781
Scrivener *v.* Pask, 618, 799
Seagrave *v.* Union Mar. Ins. Co., 212
Seaman *v.* Neatherclift, 202
Searle *v.* Lindsay, 810, 815
Searles *v.* Sadgrave, 168
Sebag *v.* Abitbol, 350
Seeger *v.* Duthie, 508

Seifferth *v.* Badham, 626
Seignior *v.* Wolmer, 666
Selby *v.* Browne, 277
Selkrig *v.* Davies, 428
Seller *v.* Jones, 601
Selwood *v.* Mildmay, 587
Semayne's case, 404, *et seq.*
Senhouse *v.* Earle, 638
Senior *v.* Armytage, 414
—— *v.* Ward, 262, 810
Seymour *v.* Greenwood, 802, 805, 809
—— *v.* Maddox, 810
Shackell *v.* Rosier, 682
Shadwell *v.* Shadwell, 702
Shand *v.* Grant, 669
Sharp *v.* Grey, 234
—— *v.* Nowell, 796
—— *v.* Powell, 201
—— *v.* Waterhouse, 443
Sharpe *v.* Great Western R. C., 743
Sharples *v.* Rickard, 103
Sharpley *v.* Overseers of Mablethorpe, 639
Sharrod *v.* London and North-Western R. C., 802
Shattock *v.* Carden, 342
Shaw *v.* Beck, 901
—— *v.* Gould, 71, 468, 481, 483
—— *v.* Jeffery, 681
Shedden *v.* Patrick, 470, 482
Sheffield Nickel Co. *v.* Unwin, 245
—— *v.* Radcliffe, 125
Shelburn *v.* Inchiquin, 623
Sheldon *v.* Sheldon, 632
Shelton *v.* Braithwaite, 157
—— *v.* Livius, 838
—— *v.* Springett, 494
Shepherd *v.* Hills, 39, 185, 848
—— *v.* Kain, 738
—— *v.* Payne, 876
—— *v.* Pybus, 616, 739, 741
—— *v.* Sharp, 7
—— *v.* Shepherd, 144
Sheppard *v.* Phillimore, 177
Sherborn *v.* Lord Huntingtower, 119
Sherwin *v.* Swindall, 309, 407
Shore *v.* Wilson, 98, 519, 575, 883
Shoreditch (Vestry of) *v.* Hughes, 102, 499
Short (*ex pte.*), 333
Short *v.* M'Carthy, 855
—— *v.* Simpson, 440
Shortrede *v.* Cheek, 562
Shower *v.* Pilck, 466
Shrewsbury *v.* Blount, 738, 745
—— Peerage (The), 557
Shutford *v.* Borough, 854
Shuttleworth *v.* Greaves, 570
—— *v.* Le Fleming, 528
Siboni *v.* Kirkman, 858
Sibree *v.* Tripp, 843
Sibthorpe *v.* Brunel, 506
Sichel *v.* Lambert, 901
Sicklemore *v.* Thistleton, 535
Siddons *v.* Short, 167, 196
Sidwell *v.* Mason, 98
Sievewright *v.* Archibald, 822
Sill *v.* Worswick, 485
Sillem *v.* Thornton, 627
Simmons *v.* Heseltine, 256
—— *v.* Lillystone, 197
—— *v.* Norton, 227, 380
—— *v.* Taylor, 669, 768
Simond *v.* Bradden, 738
Simons *v.* Johnson, 534
—— *v.* Patchett, 785
Simpson *v.* Bloss, 677, 680
—— *v.* Egginton, 713, 822
—— *v.* Holliday, 97
—— *v.* Howden (Lord), 4, 690
—— *v.* Ingham, 775
—— *v.* Lamb, 689
—— *v.* London and North Western R. C., 220
—— *v.* London General Omnibus Co., 298
—— *v.* Margeson, 567, 881
—— *v.* Nicholls, 18
—— *v.* Pickering, 322
—— *v.* Ready, 25, 635
—— *v.* Sadd, 351
—— *v.* Savage, 362, 372
—— *v.* Swan, 329
—— *v.* Thompson, 210
—— *v.* Wilkinson, 903
Sims *v.* Bond, 781
—— *v.* Marryatt, 757, 760
Singleton *v.* Williamson, 275
Siordet *v.* Hall, 219
—— *v.* Kuczynski, 103
Six Carpenters' case, 120, 293, 295

Skaife *v.* Jackson, 678
Skeate *v.* Beale, 272
Skeet *v.* Lindsay, 98
Skillett *v.* Fletcher, 659
Skinner *v.* Lambert, 529
Skipp *v.* Eastern Counties R. C., 264, 810
Skull *v.* Glenister, 447, 585
Slaman *v.* Neatherclift, 202
Slater *v.* Dangerfield, 520
—— *v.* Mayor, &c., of Sunderland, 658
Sleap *v.* Newman, 662
Sleddon *v.* Cruickshank, 402
Sleigh *v.* Sleigh, 270
Slim *v.* Croucher, 729
Slingsby *v.* Granger, 514, 587
Smallcombe *v.* Olivier, 31
Smart *v.* Harding, 717
—— *v.* Hutton, 793
—— *v.* Morton, 187, 353, 354
Smeeton *v.* Collier, 796
Smethurst *v.* Mitchell, 782
Smith *v.* Attwood, 744
—— *v.* Baker, 163, 742
—— *v.* Bell, 532, 559
—— *v.* Blakey, 916
—— *v.* Boucher, 81
—— *v.* Braine, 710
—— *v.* Bromley, 250
—— *v.* Chadwick, 729
—— *v.* Coffin, 512
—— *v.* Colgay, 861
—— *v.* Compton, 535
—— *v.* Cramer, 922
—— *v.* Doe *d.* Jersey (Earl of), 143, 556
—— *v.* Edge, 135
—— *v.* Egginton, 294
—— *v.* Fox, 855
—— *v.* Frampton, 366
—— *v.* Gibson, 324
—— *v.* Green, 221
—— *v.* Hartley, 580
—— *v.* Hodson, 161, 823
—— *v.* Jeffryes, 567, 571
—— *v.* Kay, 744
—— *v.* Keal, 798
—— *v.* Kenrick, 187,189, 32 5, 354
—— *v.* Lawrence, 809
—— *v.* Linds, 674
Smith *v.* London and South-Western R. C., 366
—— *v.* Malings, 277
—— *v.* Manners, 278
—— *v.* Marrable, 727
—— *v.* Marsack,
—— *v.* Mawhood, 694
—— *v.* Mills, 862
—— *v.* Monteith, 122, 272
—— *v.* Neale, 739, 841
—— *v.* Packhurst, 501
—— *v.* Pincomb, 259
—— *v.* Pocklington, 502
—— *v.* Pritchard, 805
—— *v.* Reg., 106
—— *v.* Render, 400
—— *v.* Ridgway, 460, 597
—— *v.* Scott, 739
—— *v.* Shirley, 407
—— *v.* Simonds, 856
—— *v.* Sleap, 782
—— *v.* Sparrow, 17, 18
—— *v.* Stafford, 120
—— *v.* Stapleton, 172
—— *v.* Sydney, 900
—— *v.* Thackerah, 186, 187, 347, 353, 853
—— *v.* Thompson, 572
—— *v.* Thorne, 716
—— *v.* Universal Insurance Co., 215
—— *v.* Wedderburne, 525
—— *v.* Wigley, 775
—— *v.* Wilson, 618, 879
—— *v.* Woodfine, 722
—— *v.* Wright, 297
Smout *v.* Ilbery, 748, 783
Smurthwaithe *v.* Wilkins, 440
Sneesby *v.* L. & Y. R. C., 211
Snell *v.* Finch, 341
Snow *v.* Peacock, 671
Snowdon *v.* Davis, 271
Soane *v.* Knight, 313
Soares *v.* Glyn, 838
Solly *v.* Forbes, 554
—— *v.* Rathbone, 795
Solomon *v.* Vintners' Co., 187, 352, 354, 372
Somerville *v.* Hawkins, 312, 314
—— *v.* Mirehouse, 84
Somes *v.* British Empire Shipping Co., 77

Sorsbie *v.* Park, 505
Sottomayer *v.* De Barros, 478, 480
Southall *v.* Rigg, 252, 709
Southampton Dock Co. *v.* Richards, 176
Southcote *v.* Stanley, 810
South Shields Waterworks Co. *v.* Cookson, 360
Spackman *v.* Evans, 686, 845
—— *v.* Miller, 445
Sparrow *v.* Chisman, 288
Spartali *v.* Benecke, 574, 620, 649, 881
Spedding *v.* Nevell, 750, 785
Speight *v.* Tedcastle, 216
Spence *v.* Chadwick, 229, 240
—— *v.* Union Marine Ins. Co., 280, 337
Spencer's case, 386, 435, 443
Spencer *v.* Handley, 693
—— *v.* Marlborough (The Duke of), 424
Spicer *v.* Cooper, 879
Spicot's case, 282
Spieres *v.* Parker, 633, 900
Spill *v.* Maule, 102, 311
Spiller *v.* Paris, &c. Co., 826
—— *v.* Westlake, 722
Spooner *v.* Payne, 584
Spotswood *v.* Barrow, 208
Spread *v.* Morgan, 248
Sprigwell *v.* Allen, 758
Springwell *v.* Callen, 733
Spry *v.* Flood, 611
Sprye *v.* Porter, 689
Squire *v.* Ford, 76, 537
Stace *v.* Griffiths, 102
Stacey, *app.*, Whitehurst, *resp.*, 828
Stadhard *v.* Lee, 646
Staffordshire and Worcestershire Canal Navigation *v.* Birmingham Canal Navigation, 359
Stallard *v.* Great Western R. C., 20
Stammers *v.* Dixon, 883
—— *v.* Hughes, 129
Stamp *v.* Sweetland, 84
Standen *v.* Christmas, 442, 607
Standish *v.* Ross, 250, 287
Staniland *v.* Hopkins, 636
Stanley *v.* Stanley, 589
Stansell *v.* Jollard, 187
Stansfield *v.* Mayor, &c., of Portsmouth, 402
Stanton *v.* Styles, 907
Stapylton *v.* Clough, 919
Startup *v.* Macdonald, 102, 879
Stavers *v.* Curling, 506, 723
Stead *v.* Anderson, 315, 344
—— *v.* Berrier, 562
—— *v.* Carey, 34, 49
—— *v.* Dawber, 842
—— *v.* Williams, 327, 344
Steavens *v.* Jeacock, 198
Stebbing *v.* Spicer, 570
Stedman's case, 305
Stedman *v.* Gooch, 777
Steele *v.* Haddock, 838
—— *v.* Harmer, 658
—— *v.* Hoe, 498
—— *v.* Shomberg, 85
—— *v.* South-Eastern R. C., 809
—— *v.* Williams, 268, 271
Stem *v.* Croucher, 729
Stephens (*ex pte.*), 401
—— *v.* Badcock, 778
—— *v.* De Medina, 725
—— *v.* Elwall, 798
—— *v.* Hill, 926
—— *v.* Pell, 553
—— *v.* Reynolds, 286
—— *v.* Taprell, 547
Stepney *v.* Lloyd, 123
Sterry *v.* Clifton, 529
Stevens *v.* Copp, 443
—— *v.* Gourley, 685, 689
—— *v.* Lynch, 250
—— *v.* Midland Counties R. C., 799
—— *v.* Stevens, 633
Stevenson *v.* Oliver, 26
Stevenson's Heirs *v.* Sullivant, 484
Steward *v.* Greaves, 532
—— *v.* Gromett, 199
—— *v.* Lombe, 396
Stewart *v.* Aberdein, 620, 879
—— *v.* Anglo-Californian Gold Mining Co., 629
—— *v.* Eddowes, 643
—— *v.* Gibson, 696

Stewart *v.* London and North-Western R. C., 251
—— *v.* Menzies, 469
—— *v.* Stewart, 249, 260
St. Helen's Smelting Co. *v.* Tipping, 355, 362
Stilwell *v.* Clarke, 327
Stirling *v.* Maitland, 278
Stockdale *v.* Hansard, 13, 89, 184
Stockport Waterworks (*re*), 433
Stockton and Darlington R. C. *v.* Barrett, 527, 529
Stokes *v.* Russell, 177
Stone *v.* Godfrey, 257
—— *v.* Marsh, 205, 206
—— *v.* Stone, 263
Storey *v.* Ashton, 802, 803
—— *v.* Robinson, 273
Storie *v.* Bishop of Winchester, 63
Story (*ex pte.*), 107, 130
Stott *v.* Fairlamb, 837
Stoughton *v.* Day, 601
Stourbridge Canal Co. *v.* Wheeley, 557
Stowell *v.* Robinson, 840
—— *v.* Zouch (Lord), 540
Stracey *v.* Nelson, 4, 532
Stradbroke (Lord) *v.* Mulcahy, 385
Stratton *v.* Pettitt, 499
Strauss *v.* Francis, 320
Stray *v.* Russell, 268
Street *v.* Blay, 735, 739, 758
Streeter *v.* Horlock, 713
Strickland *v.* Maxwell, 448
—— *v.* Turner, 251, 703
Stringer *v.* Gardiner, 569
Strode *v.* Russel, 562
Strong *v.* Foster, 339
—— *v.* Harvey, 168
Strother *v.* Hutchinson, 160
—— *v.* Lucas, 902
Stroud (*re*), 881
Stroyan *v.* Knowles, 187
Strutt *v.* Bovingdon, 322
Stuart *v.* Evans, 816
—— *v.* Jones, 24
—— *v.* Whitaker, 793
Stubbs *v.* Holywell, 231, 857
—— *v.* Parsons, 267
Stucley *v.* Baily, 736, 747
Studdy *v.* Sanders, 723
Sturges *v.* Lord Curzon, 330
Sturgis *v.* Darell, 843, 855
Sturmy *v.* Smith, 793
Sturt *v.* Blagg, 101
Submarine Telegraph Co. *v.* Dickson, 361
Suffell *v.* Bk. of England, 149
Suker *v.* Neale, 150
Summers *v.* Solomon, 286
Surplice *v.* Farnsworth, 228, 728
Surtees *v.* Ellison, 25
—— *v.* Lister, 703
Suse *v.* Pompe, 619
Sussex Peerage (The), 478, 530, 891, 892
Sutcliffe *v.* Booth, 359
Sutton (*ex pte.*), 796
—— *v.* Clarke, 6
—— *v.* G. W. R. C., 271
—— *v.* Johnstone, 185, 900
—— *v.* Sutton, 530
—— *v.* Temple, 726
Sweet *v.* Benning, 346
—— *v.* Seager, 267
Sweeting *v.* Pearce, 778
Sweetland *v.* Smith, 614
Swift *v.* Dewsbury, 276
Swinfen *v.* Lord Chelmsford, 202
Syers *v.* Jonas, 618
Sykes *v.* Giles, 778
—— *v.* Sykes, 798
Symes (*ex pte.*), 923
Symonds *v.* Lloyd, 881

T.

Taaf Vale R. C. *v.* Giles, 799
Taafe *v.* Downes, 81
Talbot *v.* Radnor (The Earl of), 167, 664
Taltarum's case, 419
Tamplin *v.* James, 260
Tancred *v.* Christy, 156
—— *v.* Leyland (*in error*), 196
Tanner *v.* Hartley, 654
—— *v.* Moore, 711
—— *v.* Smart, 615, 655
Taplin *v.* Florence, 840

Tapling *v.* Jones, 365
Tapp *v.* Lee, 749
Tarleton *v.* Liddell, 209, 282
—— *v.* Shingler, 149
—— *v.* Staniforth, 501
Tarrant *v.* Webb, 810, 815
Tarry *v.* Newman, 84
Tasker *v.* Shepherd, 859
Tassell *v.* Cooper, 822
Tattersall *v.* Fearnley, 103
Tatton *v.* G. W. R. C., 194
—— *v.* Wade, 748
Taunton *v.* Costar, 413
Taverner *v.* Little, 809
Tawney *v.* Lynn and Ely R. C. (The), 4
Taylor *v.* Ashton, 744
—— *d.* Atkyns *v.* Horde, 327
—— *v.* Best, 161
—— *v.* Bowers, 675
—— *v.* Bullen, 629, 747
—— *v.* Burgess, 660
—— *v.* Caldwell, 230
—— *v.* Chester, 675, 676
—— *v.* Clemson, 5, 88, 806
—— *v.* Cook, 899
—— *v.* Crowland Gas and Coke Co., 694
—— *v.* Dunbar, 212
—— *v.* Ford, 907
—— *v.* Great Northern R. C., 233
—— *v.* Hawkins, 102, 312, 314
—— *v.* Henniker, 196
—— *v.* Hilary, 838, 842
—— *v.* Horde, 418, 422
—— *v.* Humphries, 635
—— *v.* Laird, 613
—— *v.* Manners, 835
—— *v.* Newman, 302
—— *v.* Plumer, 761
—— *v.* St. Helen's (Corp.), 277, 548
—— *v.* Stray, 739, 882
—— *v.* Taylor, 428
—— *v.* Vansittart, 25
—— *v.* Web, 564
Tebb *v.* Hodge, 397
Teede *v.* Johnson, 249
Templeman *v.* Hayden, 350
Tenant *v.* Elliott, 678, 679
—— *v.* Goldwin, 350
Tennant, *app.*, Cumberland, *resp.*, 635
Terry *v.* Brighton Aquarium Co., 19
Tetley *v.* Easton, 345
—— *v.* Wanless, 636
Teutonia (The), 237
Thackeray *v.* Wood, 725
Thames (Conservators of) *v.* Hall, 24
Tharpe *v.* Stallwood, 862
Thellusson *v.* Lord Rendlesham, 519
Thellusson *v.* Woodford, 424
Thetis (The), 819
Thibault, *q. t. v.* Gibson, 24, 634, 635
Thicknesse *v.* Lancaster Canal Co., 557
Thistlewood *v.* Cracraft, 674
Thom *v.* Bigland, 748
Thomas *v.* Churton, 82
—— *v.* Cross, 777
—— *v.* Edwards, 782
—— *v.* Fenton, 658
—— *v.* Hayward, 443
—— *v.* Howell, 233
—— *v.* Hudson, 88
—— *v.* Packer, 389
—— *v.* Pearse, 793
—— *v.* Reg., 52, 55
—— *v.* Russell, 913
—— *v.* Thomas, 584, 703, 705
—— *v.* Waters, 48
—— *v.* Watkins, 38, 408
—— *v.* Williams, 430
Thompson (*re*), 650
—— *v.* Bell, 774
—— *v.* Gibson, 372
—— *v.* Hakewill, 505
—— *v.* Hopper, 218, 222
—— *v.* Lack, 659
—— *v.* Lapworth, 267
—— *v.* Pettit, 396
—— *v.* Shakell, 313
—— *v.* Wood, 294
Thomson *v.* Davenport, 782
—— *v.* Grant, 209
—— *v.* Harding, 119, 210
Thorburn *v.* Barnes, 107, 796
Thornborrow *v.* Whitacre, 243
Thornhill *v.* Hall, 521

Thornhill *v.* Neats, 241
Thornton *v.* Jenyns, 242, 703, 712, 722
Thorpe *v.* Aldous, 24
—— *v.* Eyre, 389
—— *v.* Thorpe, 601, 723
Thrustout *d.* Park *v.* Troublesome, 327
Thurnell *v.* Balbirnie, 243
Tidswell *v.* Whitworth, 267
Tighe *v.* Cooper, 312
Tiling *v.* Hodgson, 280
Tillett *v.* Ward, 369
Timmins *v.* Gibbins, 768, 845
Tindal (*ex pte.*), 859
Tinkler *v.* Hilder, 164
Tinniswood *v.* Pattison, 83, 459
Tinsley *v.* Nassau, 82
Tipper *v.* Bicknell, 706, 721
Titley *v.* Foxall, 906
Tivnan (*in re*), 94
Tobacco Pipe Makers *v.* Loder, 848
Tobin *v.* Reg., 52, 55, 56, 69, 800, 802, 820
Todd *v.* Emly, 788
—— *v.* Flight, 816
—— *v.* Stewart, 322
Toller *v.* Wright, 605
Tollerton (Overseers of) (*ex pte.*), 130
Tomlin *v.* Fuller, 451
—— *v.* Reg., 52
Tommey *v.* White, 318, 834
Tompkinson *v.* Russell, 793
Toms *v.* Cuming, 794
Toomer *v.* Reeves, 527
Tooth *v.* Bagwell, 235
Toplis *v.* Grane, 683
Torrington (Lord) *v.* Lowe, 882
Toulmin *v.* Anderson, 117
—— *v.* Copland, 771
Toussaint *v.* Martinnant, 613, 713
Towler *v.* Chatterton, 34
Townend *v.* Woodruff, 449
Towns *v.* Wentworth, 518
Townsend *v.* Crowdy, 251—253
—— *v.* Deacon, 857
Townshend *v.* Devaynes, 428
—— (Marquis of) *v.* Stangroom, 263
Traherne *v.* Gardner, 268
Trapps *v.* Harter, 397
Travel *v.* Carteret, 49
Traver *v.* ——, 716
Travers *v.* Blundell, 584
Treadwen *v.* Bourne, 788
Treadwin *v.* Great Eastern R. C., 463
Tregoning *v.* Attenborough, 678
Tremeer *v.* Morison, 662
Trent *v.* Hunt, 341, 829
Trent Navigation *v.* Wood, 234
Treport's case, 502
Trevivan *v.* Lawrence, 322
Trickett *v.* Tomlinson, 287
Trimble *v.* Hill, 267, 675
Trimleson (Lord) *v.* Kemmis, 894, 910, 917
Trinity House *v.* Clark, 801
Tripp *v.* Thomas, 196
Trott *v.* Trott, 901, 902
Trotter *v.* Maclean, 919
Trueman *v.* Fenton, 708
—— *v.* Loder, 280, 570, 620
Truscott *v.* Merchant Taylors' Co., 834
Tucker *v.* Newman, 273
—— *v.* Webster, 634
—— *v.* Wilson, 767
Tulk *v.* Moxhay, 432
Tullett *v.* Armstrong, 425
Tunny *v.* Midland R. C., 811
Turberville *v.* Stampe, 349, 366, 802
Turner *v.* Ambler, 100
—— *v.* Browne, 705
—— *v.* Harvey, 730
—— *v.* Hayden, 350
—— *v.* Mason, 494
—— *v.* Sheffield R. C., 179, 532
—— *v.* Skelton (*re*), 731
Turney *v.* Dodwell, 777
Tweddle *v.* Atkinson, 703, 706
Twigg *v.* Potts, 138
Twyman *v.* Knowles, 895
Twyne's case, 282, 527
Tyerman *v.* Smith, 131, 161
Tyler *v.* Jones, 857
Tyrringham's case, 296
Tyson *v.* Smith, 152, 873

U.

Udal *v.* Walton, 922
Udell *v.* Atherton, 751
Udny *v.* Udny, 71
Underhill *v.* Wilson, 823
Underwood *v.* Bedford R. C. (*re*), 114
—— *v.* Nicholls, 777, 778
Union Bank of Manchester *v.* Beech, 659
United States *v.* Fisher, 532
—— *v.* Wiltberger, 529
United States' Bank *v.* Dandridge, 899
—— *v.* Owen, 687
Unwin *v.* Clarke, 333
Upton *v.* Townhend, 32, 808
—— *v.* Wells, 406
Uther *v.* Rich, 671

V.

Valieri *v.* Boyland, 792
Valpy *v.* Manley, 268
Van Boven's case, 634
Van Casteel *v.* Booker, 763
Vance *v.* Lowther, 149
Vandeleur *v.* Vandeleur, 545
Vanderburgh *v.* Truax, 201
Vander Donck *v.* Thelluson, 892
Vandyck *v.* Hewitt, 674
Van Hasselt *v.* Sack, 161
Van Ness *v.* Pacard, 393
Van Omeron *v.* Dowick, 899
Van Sandau *v.* Turner, 88
Vansittart *v.* Taylor, 33, 131
Varney *v.* Hickman, 675
Vaughan *v.* Menlove, 349, 366
—— *v.* Wilson, 117
—— *v.* Wyatt, 138
Vaux's (Lord) case, 261
—— Peerage (The), 902
Vauxhall Bridge Co. *v.* Sawyer, 371, 527
Vavasour *v.* Ormrod, 634, 635
Venables *v.* Smith, 802
Venur *v.* Sellon, 530
Vere *v.* Ashby, 785
Vernede *v.* Weber, 738
Vernon *v.* Keys, 737
Vickers *v.* Hertz, 763
—— *v.* Wilcocks, 200
Victors *v.* Davies, 712
Vigers *v.* Dean, &c. of St. Paul's, 47
—— *v.* Pike, 288
Villeboisnet *v.* Tobin, 924
Vincent *v.* Bishop of Sodor and Man, 466, 611
—— *v.* Slaymaker, 643
Violett *v.* Sympson, 853
Vivian *v.* Mersey Dock Board, 361
Vlierboom *v.* Chapman, 610
Vose *v.* Lancashire and Yorkshire R. C., 350, 814
Vyn *v.* Foster, 707
Vyner *v.* Mersey Docks Co., 434
Vyse *v.* Foster, 707
Vyvyan *v.* Arthur, 442

W.

Waddle *v.* Downman, 580
Wade's case, 168
Wade *v.* Simeon, 119, 248, 703
Wadham *v.* Marlow, 211
Wadsworth *v.* Bentley, 324
Wain *v.* Warlters, 840
Waite *v.* North-Eastern R. C., 368
Wake *v.* Hall, 403
—— *v.* Harrop, 783, 838
Wakefield *v.* Brown, 505
—— *v.* Newbon, 272
—— Board of Health *v.* West Riding, &c. R. C. 114
Wakley *v.* Cooke, 547
Waldegrave Peerage (The), 480
Walker's case, 277
Walker *v.* Birch, 648
—— *v.* Brit. Guarantee Society, 234
—— *v.* Brogden, 310
—— *v.* Butler, 772
—— *v.* Giles, 537
—— *v.* Goe, 199
—— *v.* Great Western R. C., 780

Walker *v.* Hatton, 190
—— *v.* Hunter, 829
—— *v.* Jones, 438
—— *v.* Maitland, 212
—— *v.* Mellor, 760
—— *v.* Olding, 121
—— *v.* Perkins, 687
—— *v.* Thelluson, 160
Wallace *v.* Kelsall, 288, 678
Waller *v.* Drakeford, 337
—— *v.* S. Eastern R. C., 810, 814
Walley *v.* M'Connell, 124
Wallingford *v.* Mutual Society, 80
Wallis *v.* Day, 701
—— *v.* Littell, 839
Walmsley *v.* Milne, 397, 398
Walpole (Lord) *v.* Cholmondeley (Earl of), 568
Walsh *v.* Lincoln (Bishop of), 8
—— *v.* Secretary of State for India, 646
—— *v.* Southworth, 796
—— *v.* Trevanion, 535
Waltham *v.* Sparkes, 135
Walton *v.* Gavin, 901
Wansey, *app.*, Perkins, *resp.*, 179
Warburton *v.* Great Western R. C., 811
Ward *v.* Andrews, 380
—— *v.* Beck, 525
—— *v.* Broomhead, 822
—— *v.* Day, 166
—— *v.* Hobbs, 742
—— *v.* Johnson, 337
—— *v.* Lee, 804, 819
—— *v.* Lloyd, 687
—— *v.* Weeks, 200
Wardle *v.* Brocklehurst, 189
Wardour *v.* Berisford, 893
Ware *v.* Cann, 422, 423
—— *v.* Regent's Canal Co., 557
Waring *v.* Dewbury, 129
Warmoll *v.* Young, 343
Warne (*re*), 906
Warren *v.* Lugger, 870
Warrender *v.* Warrender, 259
Warrington (*ex pte.*), 527
—— *v.* Early, 148
Warwick *v.* Bruce, 475
—— *v.* Nairn, 709
Warwick *v.* Rogers, 193
Wason *v.* Walter, 311, 313
—— (*ex pte.*), 311
Waterer *v.* Freeman, 124
—— *v.* Waterer, 427
Waterford (The Earl of) Peerage, 135, 532
Waterpark *v.* Furnell, 884
Waters *v.* Louisville Insurance Co., 212
Watkins *v.* Great Northern R. C., 620
Watling *v.* O'Asler, 815
Watson's case, 922
Watson *v.* Bodell, 88
—— *v.* Foxon, 512
—— *v.* Little, 899
—— *v.* Quilter,
—— *v.* Russell, 706, 709
—— *v.* Swan, 777, 824
—— *v.* Turner, 708
Waugh *v.* Carver, 785
—— *v.* Middleton, 31
—— *v.* Morris, 682
Way *v.* Hearn, 567, 592, 660
Wear Commissioners *v.* Adamson, 226
Weaver *v.* Ward, 310, 349
Webb *v.* Adkins, 122
—— *v.* Austin, 177
—— *v.* Bachelour, 84
—— *v.* Beavan, 297
—— *v.* Bird, 189, 365
—— *v.* Bishop, 674
—— *v.* Cowdell, 857
—— *v.* East, 924
—— *v.* Fox, 444
—— *v.* Manchester and Leeds R. C., 4, 559
—— *v.* Plummer, 551
—— *v.* Rhodes, 235
—— *v.* Weatherby, 771
Webber *v.* Stanley, 519, 584, 597
Webster *v.* Power, 280, 465
—— *v.* Watts, 293
Weeks *v.* Maillardet, 624
Weems *v.* Mathieson, 811, 814
Weir *v.* Barnett, 276
—— *v.* Bell, 276, 756
Welchman *v.* Sturges, 862
Weld *v.* Hornby, 638, 884
Wellock *v.* Constantine, 203

Wells *v.* Abraham, 204, 205, 767
—— *v.* Pearcy, 155
—— *v.* Watling, 195
Welsh *v.* Trevanion, 602
Wemyss *v.* Hopkins, 319
Wenman (Lady) *v.* Mackenzie, 911
Wennall *v.* Adney, 708, 714, 716
Wentworth *v.* Cock, 858, 860
—— *v.* Lloyd, 894
West *v.* Blakeway, 400
—— *v.* Jackson, 721, 737
—— *v.* Lawday, 585
—— *v.* Moore, 386
—— *v.* Nibbs, 297
—— London R. C. *v.* London and N.-Western R. C., 551, 601
—— India &c. Co. *v.* Home and Col. Insurance, 213, 543
West of England Bank *v.* Nicholls, 924
Western Bank of Scotland *v.* Addie, 732
Westhead *v.* Sproson, 722
Westlake *v.* Adams, 703
Westropp *v.* Solomon, 739
Wetherell *v.* Jones, 687, 694
—— *v.* Langston, 505
Weymouth (Mayor of) *v.* Nugent, 70
Whaley *v.* Laing, 356
Whatman *v.* Pearson, 94
Wheatley *v.* Lane, 861
—— *v.* Thomas, 631
Wheeler *v.* Montefiore, 283
Wheelton *v.* Hardisty, 750, 751
Whelfdale's case, 148
Whistler *v.* Forster, 438
Whitaker *v.* Wisbey, 29, 128
Whitcher *v.* Hall, 139
White *v.* Bass, 363, 447
—— *v.* Beard, 140
—— *v.* Beeton, 509
—— *v.* Bluett, 704
—— *v.* Boulton, 806
—— *v.* Burnby, 503
—— *v.* Crisp, 361, 441
—— *v.* Garden, 292, 697
—— *app.*, Grennish, *resp.*, 292
—— *v.* Hancock, 537
—— *v.* Morris, 681
White *v.* Mullet, 337
—— *v.* Rose, 778
—— *v.* Sayer, 388
—— *v.* Sharp, 582, 796
—— *v.* Spettigue, 205, 767
—— *v.* Wiltshire, 410
Whiteaker *v.* Jackson, 322
Whitehead *v.* Bennett, 401
—— *v.* Izod, 268, 739
—— *v.* Parkes, 196
Whitehouse *v.* Birmingham Canal Co., 350
—— *v.* Fellowes, 853
Whiteley *v.* Adams, 311
Whitfield *v.* Brown, 882
—— *v.* Clement, 599
—— *v.* Lord De Spencer, 806
—— *v.* South-Eastern R. C., 311
Whitmore *v.* Robertson, 529
—— *v.* Smith, 796
Whittaker *v.* Jackson, 322
Whittle, *app.*, Frankland, *resp.*, 722
Whittome *v.* Lamb, 582
Wiat *v.* Essington, 325
Wicks *v.* Jordan, 387
Wiggett *v.* Fox, 811
Wigglesworth *v.* Dallison, 388, 389, 619, 882
Wigmore *v.* Jay, 810
Wigney *v.* Wigney, 80
Wilcox *v.* Odden, 164
Wild *v.* Harris, 703
Wilde *v.* Gibson, 729, 748, 750
—— *v.* Waters, 397, 399
Wilders *v.* Stevens, 329
Wildes *v.* Russell, 81, 113, 116, 328
Wildman *v.* Glossop, 580
Wilkes *v.* Perks, 119
—— *v.* Wood, 90
Wilkin *v.* Manning, 304
Wilkinson *v.* Evans, 629
—— *v.* Fairrie, 307
—— *v.* Johnston, 250
Willans *v.* Eyres, 554
Williams *v.* Bagot (Lord), 108
—— *v.* Bayley, 205, 677, 687
—— *v.* Burrell, 442, 505
—— *v.* Crossling, 643
—— *v.* Deacon, 778, 786

Williams *v.* East India Co., 698, 904
—— *v.* Evans, 778
—— *v.* Eyton, 900
—— *v.* Great Western R. C., 111
—— *v.* Grey, 275, 861
—— *v.* Griffith, 772
—— *v.* Hayward, 443
—— *v.* Hedley, 678
—— *v.* Hide, 232
—— *v.* Jones, 574
—— *v.* Lewis, 161, 520
—— *v.* London Commercial Exchange Co., 842
—— *v.* Mostyn, 192
—— *v.* Newton, 636
—— *v.* Paul, 18
—— *v.* Pigott, 791
—— *v.* Pritchard, 22
—— *v.* Reynolds, 228
—— *v.* Roberts, 38, 295, 408
—— *v.* Sidmouth Railway and Harbour Co., 320
—— *v.* Smith, 32, 329
—— *v.* Spence, 409
—— *v.* Stern, 287
—— *v.* Thacker, 324
—— *v.* Thomas, 161
—— *v.* Williams, 381
Williamson *v.* Allison, 733, 759
—— *v.* Barton, 782
Willion *v.* Berkley, 68—70
Willoughby *v.* Horridge, 350
—— *v.* Willoughby, 339
Wills *v.* Murray, 857
Willy *v.* Elgee, 704
Wilson *v.* Bagshaw, 451
—— *v.* Barker, 829
—— *v.* Barthrop, 782
—— *v.* Curzon (Lord), 791
—— *v.* Dunville, 221
—— *v.* Finch-Hatton, 727
—— *v.* General Iron Screw Co., 222
—— *v.* Hart, 782
—— *v.* Knubley, 861
—— *v.* Marryat, 73
—— *v.* Merry, 811, 815
—— *v.* Newport Dock Co., 218 220
—— *v.* New York (Mayor of), 6
—— *v.* Peto, 806
Wilson *v.* Rankin, 821
—— *v.* Rastall, 138
—— *v.* Robinson, 314
—— *v.* Strugnell, 267
—— *v.* Thorpe, 796
—— *v.* Tumman, 825, 829
—— *v.* Waddell, 188, 355
—— *v.* Willes, 872
—— *v.* Wilson, 703
Wiltes (The) Peerage, 28, 48, 50, 321
Wilton *v.* Dunn, 251
—— *v.* Royal Atlantic Mail Steam Co., 219
Wiltshear *v.* Cottrell, 393, 396
Windham *v.* Chetwynd, 641
Windsor's (Dean and Chapter of) case, 662
Windsor *v.* Reg., 331
Wing *v.* Mill, 714
Wingate *v.* Waite, 83
Winn *v.* Ingleby, 395
—— *v.* Mossman, 529
—— *v.* Nicholson, 119
Winser *v.* Reg., 175
Winsmore *v.* Greenbank, 182
Winspear *v.* Accidental Ins. Co., 211
Winterbottom *v.* Lord Derby, 197
—— *v.* Wright, 192, 195, 745, 810
Winterbourne *v.* Morgan, 295
Wintle *v.* Crowther, 785
Wise *v.* Great Western R. C., 264
—— *v.* Metcalf, 870
Withers *v.* Parker, 829
Withnoll *v.* Gartham, 885
Witte *v.* Hague, 807
Wolf *v.* Horncastle, 825
—— *v.* Oxholm, 74
Wolverhampton Water Co. *v.* Hawkesford, 185
Wood *v.* Bell, 458
—— *v.* Copper Miners' Co., 771
—— *v.* Dixie, 282
—— *v.* Dunn, 318
—— *v.* Dwarris, 161
—— *v.* Hewitt, 393, 403
—— *v.* Hurd, 130
—— *v.* Leadbitter, 840
—— *v.* Priestner, 553
—— *v.* Rowcliffe, 584, 602, 629

Wood *v.* The Copper Miners' Co., 504
—— *v.* Wilson, 580
Woodbridge *v.* Spooner, 837
—— Union *v.* Colneiss, 900
Woodgate *v.* Knatchbull, 793
Woodhouse *v.* Walker, 662
Woodin *v.* Burford, 782
Woodland *v.* Fear, 768
Woodley *v.* Coventry, 164
—— *v.* Metropolitan Ry., 263
Woods *v.* Finnis, 805
—— *v.* Thiedemann, 768
Woodward *v.* Pell, 330
—— *v.* Watts, 531
Woollen *v.* Wright, 829
Woolley *v.* Kay, 528
Wootton *v.* Dawkins, 262
—— *v.* Steffenoni, 505
Worrall *v.* Jacob, 257
Worseley *v.* Demattos, 283
Worsley *v.* South Devon R. C., 110
Worth *v.* Gilling, 358
Worthington *v.* Grimsditch, 98
—— *v.* Ludlow, 608
—— *v.* Warrington, 729
Wren *v.* Weild, 190
Wright *v.* Child, 793
—— *v.* Crookes, 739, 746, 823
—— *v.* Cuthell, 825
—— *v.* Greenroyd, 34
—— *v.* Hale, 29
—— *v.* Hickling, 777
—— *v.* Howard, 356
—— *v.* Leonard, 652
—— *v.* Mills, 67, 128, 138
—— *v.* Pearson, 368
—— *v.* Tallis, 641
—— *v.* Wakeford, 612
—— *v.* Wright, 425
Wrightup *v.* Greenacre, 25
Wroughton *v.* Turtle, 527, 625
Wyatt *v.* Harrison, 187, 351
Wycombe Union *v.* Eton Union, 252
Wyld *v.* Pickford, 460
Wylde *v.* Hopkins, 788
Wylie *v.* Birch, 192
Wynn *v.* Davis, 23
—— *v.* Shropshire Union Railway and Canal Co., 240
Wynne *v.* Edwards, 582

Y.

Yates *v.* Lansing, 81
Yearsley *v.* Heane, 190
Yeatman (*ex pte.*), 133
Yeats *v.* Pym, 619
Yelverton *v.* Longworth, 468, 469 471
Yeomans *v.* Williams, 836
York and North Midland R. C. *v.* Reg., 559
Youde *v.* Jones, 537
Young *v.* Austen, 834
—— *v.* Billiter, 682
—— *v.* Cole, 740
—— *v.* Davis, 298
—— *v.* Grote, 768
—— *v.* Hughes, 442
—— *v.* Lambert, 444
—— *v.* Raincock, 602
—— *v.* Robertson, 518
Younghusband *v.* Gisborne, 429

Z.

Zichy Ferraris (Countess of) *v.* Hertford (Marquis of), 660

ADDENDA ET CORRIGENDA.

Page 13, l. 19, *for* "Court" *read* "Courts."

,, 22, l. 5, for "*Les*" read "*Lex.*"

,, 28, l. 8, for "*operations*" read "*operation.*"

,, 41, l. 21, *add* in brackets, "except apparently in Ceylon, where it seems an action may be maintained against the Queen's Advocate as representing the Crown. *Hettihewage* v. *The Queen's Advocate*, 9 App. Cas. 571."

,, 51, l. 16, for "*respodneat*" read "*respondeat.*"

,, 53, n. (*f*), *add*, "For a case where it has been decided that petition of right is a legal remedy and excludes mandamus, see *Reg.* v. *Commissioners of Inland Revenue*, 12 Q. B. D. 461, 53 L. J., Q. B. 229 (C. A.)."

,, 57. The doubt expressed in the text has been set at rest in *Kinloch* v. *The Queen*, where it was held that petition of right would not lie.

,, 89, n. (*a*), *add*, "In *Bradlaugh* v. *Gosset*, 12 Q. B. D. 271; 53 L. J., Q. B. 209, it was decided, following the principle laid down in the text, that no action will lie against the Serjeant-at-Arms of the House of Commons for excluding a member of that House in obedience to its resolution."

,, 100, n. (*y*). See also *Quartz Hill Consolidated Mining Co.* v. *Eyre* (No. 2), 50 L. T. 274.

,, 110, n. (*o*), *add*, "for a recent example of this rule see *Barrow* v. *Dyster*, 13 Q. B. D. 635."

,, 125, l. 13, for "*frigitur*" read "*fingitur.*"

,, 129, n. (*a*). See the principle given in the text applied by Cairns, E., in *Hill* v. *East and West India Dock Co.*, 9 App. Cas. 448; 53 L. J., Q. B. 842.

,, 137, n. (*m*), for the words "conveyances in" *read* "conveyancers, see."

,, 137, n. (*n*), *read* "see post;—omnis, &c."

,, 138, n. (*o*). It has been decided that to support an action for infringement of a copyright it must be proved that the defendant took a substantial and material part of the plaintiff's production, *Chatterton* v. *Cave*, 3 App. Cas. 483; 47 L. J., C. P. 545.

Page 144, n. (*s*), *add*, "*Hill* v. *East and West India Dock Co.*, 9 App. Cas 448, at p. 457 ; 53 L. J., Q. B. 842."

,, 163, n. (*r*). For an illustration of the various forms of estoppel, see *Cropper* v. *Smith*, 26 Ch. Div. 700 ; 53 L. J., Ch. 170.

,, 185, n. (*o*). *Lamb* v. *Walker* has been since overruled in *Mitchell* v. *Darnley Main Colliery Co.*, 53 L. J., Q. B. D. 471.

,, 189, n. (*n*). The principle of law that there is no property in underground water has been recently recognised in *Ballard* v. *Tomlinson*, 26 Ch. Div. 194.

,, 191, n. (*t*), *add*, "*Truman* v. *London, Brighton & S. C. R. Co.*, 25 Ch. Div. 423 ; 53 L. J., Ch. 209."

,, 195, n. (*e*), *for* "Pindar" *read* "Pender."

,, 199, n. (*u*), for words, "in C. A." *insert* "S. C."

,, 201, n. (*c*). The case of *The Parana* followed in *The Notting Hill*, 9 P. D. 105.

,, 204, *for* "Wills" *read* "Wells."

,, 217, n. (*g*). For an exhaustive definition of what constitutes contributory negligence, see *Davey* v. *L. & S. W. R. Co.*, 12 Q. B. D. 70 ; 53 L. J., Q. B. 58.

,, 221. The blank note to be (*z*).

,, 234, l. 16, after word "passengers," *insert*, "unlike a carrier of goods."

,, 262, n. (*u*), *add*, "*Davey* v. *L. & S. W. R. Co.*, 12 Q. B. D. 70 ; 53 L. J., Q. B. 48."

,, 302, n. (*h*), *add*, "*Reg.* v. *Somerset*, 12 Q. B. D. 360 ; *Cundy* v. *Le Cocq*, 13 Q. B. D. 207 ; 53 L. J., M. C. 125."

,, 318, n. (*a*), *add* after word "cited"—"see *Brunsden* v. *Humphrey*, 53 L. J., Q. B. D. 476, which decides that there may be two causes of action arising out of one and the same act, and that therefore judgment obtained in respect of one of such causes of action is no bar to a second action based on the other."

,, 319, n. (*b*). See also *Vallance* v. *Falle*, 13 Q. B. D. 109 ; 53 L. J., Q. B. 459, and *Priestman* v. *Thomas*, 9 P. D. 70 ; 53 L. J., P. & D. 58."

,, 347, n. (*d*). See *Truman* v. *The London, Brighton & S. C. R. Co.*, 25 Ch. Div. 423, at p. 432.

,, 356, n. (*k*), *add*, "*Whalley* v. *L. & Y. R. Co.*, 13 Q. B. D. 131 ; 53 L. J., Q. B. 285."

,, 366, n. (*z*), *add*, "The principle of this case was applied and perhaps extended in *The Queen* v. *Williams*, 9 App. Cas. 418 ; 53 L. J., P. C. 64."

,, 360, n. (*r*), *for* "15 L. Ex." *read* "15 L. J. Ex. 315."

,, 403, n. (*a*), *add*, "affirmed on appeal to the House of Lords, 52 L. J., Q. B. 494."

Page 424, n. (*e*), *add*, "It would appear that where alternative periods are specified in the will, and one period has been applied and exhausted, a second period is not to be applied to extend the period of accumulation. See *Jagger* v. *Jagger*, 25 Ch. Div. 729; 53 L. J., Ch. 201."

,, 453, n. (*d*), *add*, "*Murray* v. *Scott*, 9 App. Cas. 519, at p. 546."

,, 518, n. (*b*). See also *Bradford* v. *Young*, 26 Ch. Div. 656.

,, 540, n. (*y*). See observations of Selborne, C., in *Municipal Building Society* v. *Kent*, 9 App. Cas. 260, at p. 269; 53 L. J., Q. B. 290.

,, 541, n. (*b*), *add*, "cited in *Joumenjoy* v. *Watson*, 9 App. Cas. 561, at p. 569."

,, 552, n. (*m*), *add*, "See the maxim recognised in the case of a policy of marine insurance, *Birrell* v. *Dryer*, 9 App. Cas. 345, at p. 350."

,, 588, n. (*n*). *Rishton* v. *Cobb*, doubted in *Re Boddington*, 25 Ch. Div. 685.

,, 595, n. (*n*), *add*, "The distinction between mere false description, and that description which amounts to a condition, so that if the donee fails to satisfy the description the gift is void, should be carefully observed. This distinction is well illustrated in *Re Boddington*, 22 Ch. Div. 597, in C. A. 25 Ch. Div. 685."

,, 705, l. 28, for "*priority*" read "*privity*."

,, 714, n. (*z*). See also *Green* v. *Humphries*, 26 Ch. Div. 474; 53 L. J., Ch. 625.

,, 732, n. (*z*), *add*, "affirmed in C. A., 13 Q. B. D. 351."

,, 743, l. 5, *for* "and referring" *read*, "the reader is referred."

,, 749, n. (*x*), *add*, "affirmed on appeal, 13 Q. B. D. 360."

,, 774, n. (*r*). See also *London and County Bank* v. *Terry*, 25 Ch. Div. 692 (C. A.); 53 L. J., Ch. 404.

,, 878, n. (*n*), *add*, "*Barrow* v. *Dryster*, 13 Q. B. D. 635, which illustrates the text."

,, 882, l. 14, last word but one, for the word "and" *read* "but."

,, 928, n. (*e*), *add*, "namely, 47 Vict. c. 14."

LEGAL MAXIMS.

CHAPTER I.

§ I.—RULES FOUNDED ON PUBLIC POLICY.

THE Maxims contained in this section being of general application and resulting so directly from the simple principles on which our social relations depend, it has been thought better to place them first in this collection,—as, in some measure, introductory to the more precise and technical rules which embody the elementary doctrines of English law.

SALUS POPULI SUPREMA LEX. (*XII. Tables:—Bacon, Max., reg.* 12.)—*That regard be had to the public welfare, is the highest law.*

Public safety.

This phrase is based on the implied assent on the part of every member of society, that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy or even sacrificed for

the public good (*a*). "There are," says *Buller*, J. (*b*), "many cases in which individuals sustain an injury for which the law gives no action; as, where private houses are pulled down or bulwarks raised on private property, for the preservation and defence of the kingdom against the king's enemies." Commentators on the civil law, indeed, have said (*c*), that, in such cases, those who suffer have a right to resort to the public for satisfaction; but no one ever thought that our own common law gave an action against the individual who pulled down the house or raised the bulwark (*d*). On the same principle, viz. that a man may justify committing a private injury for the public good, the pulling down of a house when necessary, in order to arrest the progress of a fire, is permitted by the law (*e*).

Likewise, in less stringent emergencies, the maxim is, that a private mischief shall be endured, rather than a public inconvenience (*f*); and, therefore, if a highway be out of repair and impassable, a passenger may lawfully go over the adjoining land, since it is for the public good

(*a*) *Alibi diximus res subditorum sub eminenti dominio esse civitatis, ita ut civitas, aut qui civitatis vice fungitur, iis rebus uti, easque etiam perdere et alienare possit, non tantum ex summâ necessitate, quæ privatis quoque jus aliquod in aliena concedit, sed ob publicam utilitatem, cui privatas cedere illi ipsi voluisse censendi sunt qui in civilem cœtum coierunt.* Grotius de Jure Belli et Pac. Bk. 3, c. 20, s. 7, § 1.—*Le Salut du peuple est la suprême loi.* Mont. Esp. des Lois, L. XXVII. Ch. 23. *In casu extremæ necessitatis omnia sunt communia.* 1 Hale, P. C. 54.

(*b*) *Per* Buller, J., *Plate Glass Co. v. Meredith*, 4 T. R. 797; Noy, Max. 9th ed. 36; Dyer, 60 b.; 12 Rep. 12, 13.

(*c*) See Puff. de Jure Nat. Bk. 8, c. 5, s. 7; Grotius de Jure Bell. et Pac. Bk. 3, c. 20, s. 7, § 2.

(*d*) *Per* Buller, J., 4 T. R. 797.

(*e*) Noy, Max., 9th ed., 36; 12 Rep. 12; Dyer, 36 b; Plowd. 322; Finch's Law, 39; *Russell* v. *Mayor of New York*, 2 Denio (U. S.), R. 461, 474.

(*f*) *Absor* v. *French*, 2 Show. 28; *Dawes* v. *Hawkins*, 8 C. B. N. S. 848, 856, 859; *per* Pollock, C.B., *A.-G.* v. *Briant*, 15 M. & W. 185.

that there should be, at all times, free passage along thoroughfares for subjects of the realm (*g*).

The principle underlying the maxim, as well as the limitation with which it is applied, is well illustrated by the following expressions of *Cockburn*, L. C. J., "The power to erect a sea-wall or embankment as a protection against the sea, or from the influx of the tide in rivers, is one of those things which emanate from the prerogative of the Crown for the general safety of the public, and no doubt the ordinary right of property must give way to that which is done under that great prerogative authority for the protection and safety of the public, but only to the extent to which it is necessary that private rights or public rights should be sacrificed for the larger public purposes, the general common weal of the public at large" (*h*).

Upon the principle we are discussing, also depends the right of the State to interfere with and place a limit to rights of property for the purposes of revenue and the support of government (*k*).

Taxes, &c.

It is, however, a rule of law, which has been designated as a "legal axiom," requiring no authority to be cited in support of it, that "no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate, or toll, except upon clear and distinct legal authority, established by those who seek to impose the burden" (*l*).

(*g*) *Per* Lord Mansfield, C.J., *Taylor* v. *Whitehead*, 2 Dougl. 749; *per* Lord Ellenborough, C.J., *Bullard* v. *Harrison*, 4 M. & S. 393; *Dawes* v. *Hawkins*, 8 C. B. N. S. 848; *Robertson* v. *Gantlett*, 16 M. & W. 296; *A.-G.* v. *Lockwood*, 9 M. & W. 401; *Campbell* v. *Race*, 7 Cushing (U.S.), R. 408. *Secus*, where dedication of road to public is not absolute. *Arnold* v. *Holbrook*, L. R. 8 Q. B. 96.

(*h*) *Greenwich Board of Works* v. *Maudslay*, L. R. 5 Q. B. 397, 401.

(*k*) *Per* Lord Camden, *Entick* v. *Carrington*, 19 How. St. Tr. 1066.

(*l*) *Per* Wilde, C.J., *Gosling* v. *Veley*, 12 Q. B. 407. "The law of

Railway and other Acts.

In the familiar instance, likewise, of an Act of Parliament for promoting some specific object or undertaking of public utility, as a turnpike, navigation, canal, railway, or paving Act, the legislature will not scruple to interfere with private property, and will even compel the owner of land to alienate his possessions on receiving a reasonable price and compensation for so doing (*m*); but such an arbitrary exercise of power (*n*) is indulged with caution; the true principle applicable to all such cases being, that the private interest of the individual is never to be sacrificed to a greater extent than is necessary to secure a public object of adequate importance (*o*). The Courts, therefore, will not so construe an Act of Parliament as to deprive persons of their estates and transfer them to other parties without compensation, in the absence of any manifest or obvious reason of policy for thus doing, unless they are so fettered by express statutory words as to be unable to extricate themselves, for they will not suppose that the legislature had such an intention (*p*). And

England is most careful to protect the subject from the imposition of any tax, except it be founded upon and supported by clear and distinct lawful authority." *Per* Martin, B., *Gosling* v. *Veley*, 4 H. L. Cas. 727. *Per* Lord Truro, *Id.* 781. "The law requires clear demonstration that a tax is lawfully imposed." Judgm., *Burder* v. *Veley*, 12 A. & E. 247. "It is a well settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language." *Per* Bayley, J., *Denn* v. *Diamond*, 4 B. & C. 245; *per* Bramwell, B., *A. G.* v. *Lord Middleton*, 3. H. & N. 138; *et vid. Oriental Bank* v. *Wright*, 5 App. Cas. 842.

(*m*) As to the items recoverable in respect of depreciation of property under the Lands Clauses Act, 1845, see *Duke of Buccleuch* v. *Metrop. Board of Works*, L. R. 5 H. L. 418.

(*n*) See *per* Lord Eldon, C., 1 My. & K. 162. Judgm., *Tawney* v. *Lynn and Ely R. C.*, 16 L. J. Ch. 282; *Webb* v. *Manchester and Leeds R. C.* 4 My. & Cr. 116.

(*o*) See Judgm., *Simpson* v. *Lord Howden*, 1 Keen, 598, 599; *Lister* v. *Lobley*, 7 A. & E. 124.

(*p*) See *per* Lord Abinger, C.B., *Stracey* v. *Nelson*, 12 M. & W. 540, 514; *per* Alderson, B., *Doe* d.

"where an Act of Parliament is susceptible of two constructions, one of which will have the effect of destroying the property of large numbers of the community and the other will not," the Court will "assume that the legislature intended the latter to be applied to it" (*q*). Also as judicially observed where large powers are entrusted to a company to carry their works through a great extent of country without the consent of the owners and occupiers of land through which they are to pass, it is reasonable and just, that any injury to property which can be shown to arise from the prosecution of those works should be fairly compensated to the party sustaining it (*r*), and likewise it is required that the authority given should be strictly pursued and executed (*s*).

Example

In accordance with the maxim under notice, it was held, that, where the commissioners appointed by a paving Act occasioned damage to an individual, without any excess of jurisdiction on their part, neither the commissioners nor the paviors acting under them were liable to an action, the statute under which the commissioners acted not giving them power to award satisfaction to the individuals who happened to suffer; and it was observed, that some individuals suffer an inconvenience under all such Acts of Parliament, but the interests of individuals must give way

Hutchinson v. *Manchester and Rossendale R. C.*, 14 M. & W. 694; *Anon.*, Lofft. 442; *R.* v. *Croke*, Cowp. 29; *Clarence R. C.* v. *Great North of England R. C.* 4 Q. B. 46.

(*q*) *Per* Erle, C.J., *The Vestry of Chelsea* app., *King* resp., 17 C. B. N. S. 629.

(*r*) *Caledonian R. C.* v. *Walker's Trustees*, 7 App. Cas. 259; 46 L. T. 826; 30 W. R. 251; *Metropolitan Board of Works* v. *M'Carthy*, L. R. 7 H. L. 243; 43 L. J. C. P. 385; 31 L. T. 182.

(*s*) See *Taylor* v. *Clemson*, 2 Q. B. 978, 1031; S. C., 11 Cl. & F. 610; *per* Lord Mansfield, C.J., *R.* v. *Croke*, 1 Cowp. 26; *Ostler* v. *Cooke*, 18 Q. B. 143.

to the accommodation of the public (*t*)—*privatum incommodum publico bono pensatur* (*u*). And "where authority is given by the legislature to do an act, parties injured by the doing of it have no legal remedy, but should appeal to the legislature" (*x*). Where, however, the terms of the statute are not imperative but permissive, and where it is left to the discretion of the persons empowered, to determine whether the general powers committed to them shall be put into execution or not, the inference is drawn that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer licence to commit nuisance in any place which might be selected for the purpose (*y*).

We shall hereafter have occasion to consider minutely the general principles applicable for interpreting statutes passed with a view to the carrying out of undertakings calculated to interfere with private property. We may, however, observe, in connection with our present subject, that the extraordinary powers with which railway and other similar companies are invested by the legislature, are given to them "in consideration of a benefit which, notwithstanding all other sacrifices, is, on the whole, hoped to be obtained by the public;" and that, since the

(*t*) *Plate Glass Co.* v. *Meredith*, 4 T. R. 794, and *Boulton* v. *Crowther*, 2 B. & C. 703; cited *per* Williams, J., *Pilgrim* v. *Southampton and Dorchester R. C.*, 7 C. B. 228; *Wilson* v. *Mayor of New York*, 1 Denio (U.S.), R. 595, 598; see *Sutton* v. *Clarke*, 6 Taunt. 29; cited 10 C. B. N. S., 777, 779; *Alston* v. *Scales*, 9 Bing. 3.

(*u*) Jenk. Cent. 85.

(*x*) See *per* Wilde, C.J., 7 C. B. 226; *Mayor of Liverpool* v. *Chorley Waterworks Co.*, 2 De G. M. & G. 852, 860; *Dixon* v. *Metrop. Bd. of Works*, 7 Q. B. D. 418; 50. L. J. Q. B. 772; 30 W. R. 83.

(*y*) *Per* Lord Watson, *Metrop. Asylum Bd.* v. *Hill*, 6 App. Cas. 193, 213; 50 L. J. Q. B.; 44 L. T. 653.

public interest is to protect the private rights of all individuals, and to save them from liabilities beyond those which the powers given by such Acts necessarily occasion, they must always be carefully looked to, and must not be extended further than the legislature has provided, or than is necessarily and properly required for the purposes which it has sanctioned (*z*). It is, moreover, important to notice the distinction which exists between public and private Acts of Parliament, with reference to the obligations which they impose. For general and public Acts bind all the Queen's subjects; but of private Acts of Parliament, meaning thereby not merely private estate Acts, but local and personal (*b*), as opposed to general public Acts, "it is said, that they do not bind strangers, unless by express words or necessary implication the intention of the legislature to affect the rights of strangers is apparent in the Act; and whether an Act is public or private does not depend upon any technical considerations (such as having a clause or declaration that the Act shall be deemed a public Act), but upon the nature and substance of the case" (*c*).

Distinction between public and private Acts.

On the other hand, where a statute authorises the stopping up and diverting of a highway, and thus interferes with the rights of the public with a view to promoting the convenience of an individual, such provisions as the Act contains framed for ensuring compensation to the public must receive a liberal construction. "The

(*z*) *Per* Lord Langdale, M.R., *Colman* v. *Eastern Counties R. C.*, 10 10 Beav. 14; *Loosemore* v. *Tiverton & N. Devon Ry.*, 22 Ch. D. 25; 31 W. R. 130.

(*b*) See *Cock* v. *Gent*, 12 M. & W. 234; *Shepherd* v. *Sharp*, 1 H. & N. 115; Dwarris on Statutes, 2nd Ed., 463.

(*c*) *Per* Wigram, V. C., *Dawson* v. *Paver*, 5 Hare, 434 (citing *Barrington's case*, 8 Rep. 138 a, and *Lucy* v. *Levington*, 1 Ventr. 175).

rights of the public and the convenience of the individual constantly come into opposition;" in such cases "there may be sometimes vexatious opposition on the one hand, but there may be also on the other very earnest pursuit of individual advantage, regardless of the rights and convenience of the public. Full effect, therefore, ought to be given to provisions by which, while due concession is made to the individual, proper protection is also afforded to the public" (*d*).

Criminal law.

From the principle under consideration, and from the very nature of the social compact on which municipal law is theoretically founded, and under which every man, when he enters into society, gives up a part of his natural freedom, result those laws which, in certain cases, authorise the infliction of penalties, the privation of liberty, and even the destruction of life, with a view to the future prevention of crime, and to insuring the safety and well-being of the public; penal laws, however, should evidently be restrained within the narrowest limits which may be deemed by the legislature compatible with the above objects, and should be interpreted by the judges, and administered by the executive, in a mild and liberal spirit. Before any man is subjected to a penalty, a clear case for its imposition should be made out (*e*). A maxim is, indeed, laid down by Lord *Bacon*, which might at first sight appear inconsistent with these remarks; for he observes, that the law will dispense with what he designates as the "*placita juris*," "rather than crimes and wrongs should be unpunished, *quia salus populi suprema lex*," and "*salus populi* is contained in the repressing offences

(*d*) *Reg.* v. *Newmarket Ry. Co.*, 15 Q. B. 702, 713.

(*e*) *Walsh* v. *Bishop of Lincoln*, L. R. 10 C. P. 533; 44 L. J. C. P. 244; 32 L. T. 271.

by punishment," and, therefore, *receditur a placitis juris potius quam injuriæ et delicta maneant impunita* (*f*). This maxim must, at the present day, be understood to apply to those cases only in which the judges are invested with a discretionary power to permit such amendments to be made, *ex. gr.*, in an indictment, as may prevent justice from being defeated by mere verbal inaccuracies, or by a non-observance of certain legal technicalities (*g*); and a distinction must, therefore, still be remarked between the "*placita*" and the "*regulæ*" *juris*, inasmuch as the law will rather suffer a particular offence to escape without punishment, than permit a violation of its fixed and positive rules (*h*).

NECESSITAS INDUCIT PRIVILEGIUM QUOAD JURA PRIVATA. (*Bac. Max., reg.* 5.)—*In the domain of Jus privatum necessity imports privilege.*

"The law chargeth no man with default where the act is compulsory and not voluntary, and where there is not a consent and election; and therefore if either there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason as in presumption of law man's nature cannot overcome, such necessity carrieth a privilege in itself" (*i*).

Involuntary action.

Bacon has in this passage fallen into the common error of opposing compulsory to voluntary action. The opposite to

(*f*) Bac. Max., reg. 12.

(*g*) See 14 & 15 Vict. c. 100, ss. 1, 24.

(*h*) Bac. Max., reg. 12. The doctrine of our law as to avoiding contracts on the ground that they are opposed to public policy will hereafter be considered.

(*i*) Bacon's Maxims, reg. 5, cited 1 T. R. 32. Jenk. Cent. 280.

voluntary action is involuntary, and the very strongest forms of compulsion do not exclude voluntary action. A criminal walking to execution is under compulsion if any one can be said to be so, but his motions are just as much voluntary actions as if he were leaving his place of confinement to regain his liberty. That the law will hold no man responsible for an act, which is involuntary in the strict metaphysical sense, it is unnecessary to state (*k*).

Compulsion.

The question of compulsion gives rise to a great deal more difficulty. The only forms of compulsion which may form an excuse for an act in itself against the law, are 1. Compulsion by a husband over his wife. 2. By threats of injury to person or property. 3. By necessity. Upon the first head the law is in a state of vagueness and incongruity. If a married woman commits a theft or receives stolen goods, knowing them to be stolen, in the presence of her husband, she is presumed to have acted under his coercion, and his coercion excuses her act; but this presumption may be rebutted if the circumstances of the case show that she was not coerced. It is uncertain how far this principle applies to felonies in general. It does not apply to high treason or murder. It probably does not apply to robbery. It applies to uttering counterfeit coin and seemingly to misdemeanours generally (*l*).

Compulsion by husband.

Compulsion by rioters.

It would seem to be a good defence to a criminal charge that the act was done under the compulsion of a body of rebels or rioters, and that the part played by the offender was a subordinate one (*m*).

Necessity proper.

Necessity properly so called furnishes a defence to a

(*k*) Hist. Cr. Law, Stephen, 1, 152.

(*l*) Dig. Cr. Law, Stephen, § 30, and note ii., where all the authorities are collected.

(*m*) *R.* v. *McGrowther*, 18 St. Trials, 394; *R.* v. *Crutchley*, 5 C. & P. 133.

criminal charge where the act has been committed in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, and no more has been done than was reasonably necessary for that purpose, and the evil inflicted by the act was not disproportionate to the evil avoided (*n*). Under this head properly comes the illustration given by Lord *Bacon*, of the two men who, swimming in the sea after shipwreck, both seize a plank not large enough to support both (*o*). Necessity in the sense above defined is also a subject of great uncertainty, and there exist no rules for determining what circumstances would constitute such an excuse for crime.

Bacon's necessity.

Lord *Bacon* uses the term necessity in a very much wider sense than the foregoing, and would include under it all forms of compulsion. The division of necessity which he adopts, however illogical, is convenient for the collection of many illustrations, derived from civil as well as criminal Law, which may be considered to bear upon the heading of this chapter.

Necessity, he says, is of three sorts: 1. Necessity of conservation of life. 2. Necessity of obedience. 3. Necessity of the act of God or of a stranger (*p*).

Self-preservation.

Under the first of these divisions, *Bacon* cites the instance of the plank which has been above noticed. The drowning of one man by another in such a case is excusable homicide, just as much as death caused in self-defence or by misadventure, under neither of which heads can it be

(*n*) Stephen's Dig. Cr. L. § 32.

(*o*) Bacon's Maxims, 5. See *Commonwealth* v. *Holmes*, 1 Wall. Jr. 1, where it was held that the victim ought to be chosen by ballot, and *Mouse's case*, 12 Rep. 63.

(*p*) Bac. Max. 5; Noy, Max. 9th ed. 32.

brought. Homicide is excusable on the ground of self-defence, where a man, being attacked by another, flies without fighting, and, after retreating as far as he safely can, turns round and kills his assailant (*q*). But if two persons quarrel and fight, neither is regarded as defending himself, until he has in good faith fled from the fight as far as he can (*r*). It may therefore be generally said that homicide, the result of a blow struck in fight, is not excusable. The above principle extends to the leading civil and natural relations of life; therefore, master and servant, parent and child, husband and wife, killing an assailant, one in defence of the other respectively, may be excused under similar circumstances (*s*).

Necessity of obedience to existing laws.

2. Obedience to existing laws often furnishes excuse for an act, which of itself would be culpable (*t*). As, where the proper officer executes a criminal in strict conformity with his sentence, or where an officer of justice, or other person acting in his aid, in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it (*u*). And where a known felony is attempted upon any one, not only the party assaulted may repel force by force, but his servant attending him, or any other person present, may interpose to prevent the mischief, and, if death ensue, the party so interposing will be justified (*x*). So, in executing process, a sheriff, it has been observed, acts as a ministerial officer in pursuance of the command he receives in the king's name from a court of justice, which command he is bound to obey. He is not a volunteer, acting from his own free will or for his own benefit, but

(*q*) Arch. Cr. Pl. 16th ed. 586.

(*r*) Step. Dig. Cr. Law, § 200.

(*s*) Fost. Hom. 274 *et seq.*, where distinction is pointed out between justifiable and excusable homicide, both *se defendendo*.

(*t*) *Ejus vero nulla culpa est cui parere necesse sit.* D. 50, 17, 169.

(*u*) Fost. Disc. Hom., 270.

(*x*) *Ibid.*, 274.

imperatively commanded to execute the king's writ. He is the servant of the law, and the agent of an overruling necessity; and if the service of the law be a reasonable service, he is (in accordance with the above maxim) justly entitled to expect indemnity (*y*), so long as he acts with diligence, caution, and pure good faith; and, it should be remembered, he is not at liberty to accept or reject the office at his pleasure, but must serve if commanded by the Crown (*z*).

"The law has always held the sheriff strictly, and with much jealousy, to the performance of his duty in the execution of writs—both from the danger there is of fraud and collusion with defendants, and also because it is a disgrace to the Crown and the administration of justice, if the king's writ remains unexecuted" (*a*). In this case, therefore, the rule of law usually applies,—*necessitas quod cogit defendit* (*b*); although instances do occur where the sheriff is placed in a situation of difficulty because he is the mere officer of the Court, and the Court are bound to see that suitors obtain the fruits of decisions in their favour (*c*).

The actions of a third person will only afford a defence for an act in itself criminal, where they are of such a nature as to make it strictly involuntary in the correct sense noticed at the beginning of this chapter. Thus, if A., by force, take the hand of B., in which is a weapon,

(*y*) For instance, by Interpleader, as to which see *per* Maule, J., 3 C. B. 341, 342. *Per* Rolfe, B., 15 M. & W. 197. *Per* Alderson, B., 14 *Id.* 801.

(*z*) *Per* Vaughan, B., *Garland* v. *Carlisle* (*in error*), 2 C. B. & M. 77; S. C., 4 Cl. & F. 701.

(*a*) Judgm., *Howden* v. *Standish*, 6 C. B. 520. As to the sheriff's duty in respect of executing criminals capitally convicted, see *R.* v. *Antrobus*, 2 A. & E. 788.

(*b*) 1 Hale, P. C. 54.

(*c*) See particularly *Stockdale* v. *Hansard*, 11 A. & E. 253; *Christopherson* v. *Burton*, 3 Exch. 160; *per* Jervis, C.J., *Gregory* v. *Cotterell*, 5 E. & B. 584; *Hooper* v. *Lane*, 6 H. L. Cas. 443.

and therewith kill C., A. is guilty of murder, but B. is excused; though, if merely a moral force be used, as threats, duress of imprisonment, or even an assault to the peril of his life, in order to compel him to kill C., this is no legal excuse (*d*).

Limitation of rule.

It must be observed, however, that necessity privileges only *quoad jura privata*, and that, if the act to be done be against the commonwealth, necessity does not excuse—*privilegium contra rempublicam non valet* (*e*).

It is owing to this principle that a wife has no excuse for treason in the fiction of marital compulsion, and where an individual is required to sacrifice his own life for the good of the community, the necessity of self-preservation, which excuses *quoad jura privata*, is overruled by that higher necessity which regard to the public welfare imposes, and the maxim applies, *necessitas publica major est quàm privata*. Death, it has been observed, is the last and farthest point of particular necessity, and the law imposes it upon every subject, that he prefer the urgent service of his king and country to the safety of his life (*f*).

SUMMA RATIO EST QUÆ PRO RELIGIONE FACIT. (*Co. Litt.* 341. *a*).—*That course is to be adopted in preference to others, which conduces to the cause of Religion.*

The maxim above cited from the commentaries of Sir *E. Coke* is, in truth, derived from the Digest; where

(*d*) 1 Hale, P. C. 434; 1 East, P. C. 225.

(*e*) Bac. Max., reg. 5; Noy, Max., 9th ed., 34; arg. 4, St. Tr. 1169.

(*f*) Bac. Max., reg. 5; Noy, Max., 9th ed., 34. In connection with the subject above considered, see the maxim "*Lex non cogit ad impossibilia*," post.

Papinian, after remarking that certain religious observances were favoured by the Roman law, gives as a reason *summam esse rationem quæ pro religione facit* (*g*).

The doctrine, thus expressed, and recognised by our own law, must be understood in a somewhat qualified sense, and should be cautiously applied, for, whilst on the one hand, "there are many social duties which are not enforced, and many wicked deeds which are not punished by human laws" (*h*), so, on the other, an act springing from very laudable motives may expose to punishment (*i*).

Human give way to divine laws.

It may, however, safely be affirmed that, if ever the laws of God and man are at variance, the former are to be obeyed in derogation of the latter; that the law of God is, under all circumstances, superior in obligation to that of man; and that, consequently, if any general custom were opposed to the Divine Law, or if any statute were passed directly contrary thereto,—as if it were enacted generally, that no one should give alms to any object in ever so necessitous a condition,—such a custom, or such an Act, would be void (*k*).

Foreign law.

Not only would the general maxim which we have been considering apply, if a conflict should arise between the law of the land and the law of God, but it likewise holds true with reference to foreign laws, wheresoever such laws are deemed by our courts inconsistent with the divine; for although it is well known that courts of justice in this country will recognise foreign laws and institutions, and will administer the *lex loci* in determining as to the

(*g*) Dig. 11. 7. 43.

(*h*) *Per Cur.*, 1 Denio (U. S.), R. 206.

(*i*) See, for instance, *Reg.* v. *Sharpe*, Dearsl. & B. 160.

(*k*) Doct. & Stud., 18th ed., 15, 16; Noy, Max., 9th ed., 2; Finch's Law, 75, 76.

validity of contracts, and in adjudicating upon the rights and liabilities of litigating parties, yet inasmuch as the proceedings in our courts are founded upon the law of England, and since that law is in part founded upon the law of nature and the revealed law of God, it follows, that, if the right sought to be enforced is inconsistent with either of these, the English municipal courts cannot recognise it; and it may therefore be laid down generally, that what is called international comity, or the *comitas inter communitates*, cannot prevail here in any case, where its observance would tend to violate the law of this country, the law of nature, or the law of God (*l*).

DIES DOMINICUS NON EST JURIDICUS. (*Noy, Max.* 2.)—*Sunday is not a day for judicial or legal proceedings.*

The Sabbath-day is not *dies juridicus*, for that day ought to be consecrated to divine service (*m*). The keeping one day in seven holy as a time of relaxation and refreshment, as well as for public worship, is, indeed, of admirable service to a state considered merely as a civil institution; and it is the duty of the legislature to remove, as much as possible, impediments to the due

(*l*) See *per* Best, J., *Forbes* v. *Cochrane*, 2 B. & C. 471. Phillimore, Int. Law, iv. 13. Under this maxim also may be noticed the immunity of church property from legal process. *Parry* v. *Jones*, 1 C. B. N. S. 345. In the relation of Ecclesiastical to the Civil Law in this country, *v. Martin* v. *Mackonochie*, 6 App. Cas. 424, 446. *Per* Lord Blackburn, 51 L. J. P. C. 88.

(*m*) Co. Litt. 135 a; Wing. Max. 5 (p. 7); Finch's Law, 7; arg. *Winsor* v. *Reg.* 6 B. & S. 143, 164. Query whether the verdict in a criminal case can be taken and recorded on a Sunday? *Id.*

observance of the Lord's day (*n*). The Houses of Parliament indeed may, in case of necessity, sit on a Sunday (*o*); but the judges cannot do so, that day being exempt from all legal business by the common law (*p*).

Statute.

It has been remarked by a recent eminent Judge, that full effect should be given to laws which are passed for the purpose of preserving the sanctity of the day of rest (*q*). The principal of these, *The Lord's Day Act*, 29 Car. 2, c. 7, s. 1, enacts, that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of his ordinary calling on Sunday (works of necessity and charity only excepted), and that every person of the age of fourteen years offending in the premises shall forfeit the sum of 5*s*. (*r*). The effect of which enactment is, that if a man, in the exercise of his ordinary calling (*s*), make a contract on a Sunday, that contract will be void, so as to prevent a party, who was privy to what made it illegal, from suing upon it in a court of law, but not so as to defeat a claim made upon it by an innocent party (*t*). A horse-dealer, for

(*n*) See the preamble of Stat. 3 & 4 Will. 4, c. 31.

(*o*) *Per* Sir Geo. Grey, Feb. 19, 1866, Hans. Parl. Deb. 3rd Series, vol. 181, p. 763.

(*p*) *Per* Patteson, J., 3 D. & L. 330; *per* Erle, C. J., *Mumford* v. *Hitchcocks*, 14 C. B. N. S. 369; *Fish* v. *Brokel*, Plowd. 265; S. C., Dyer, 181 b.; Noy, Max., 9th ed., 2; *Mackalley's case*, 11 Rep. 65 a; 3 & 4 Will. 4, c. 42, s. 43. See O. LXIV. rr. 2, 3 of the Rules of Court, 1883, and *Morris* v. *Richards*, 45 L. T. 210.

(*q*) *Per* Willes, J., *Copley* v. *Burton*, L. R. 5 C. P. 489, 493; 39 L. J. M. C. 141; 22 L. T. 888.

(*r*) Exceptions to the above general rule are in certain cases allowed by statute, see *R.* v. *Younger*, 5 T. R. 449; *Reg.* v. *Whiteley*, 3 H. & N. 143.

(*s*) See *R.* v. *Inhabs. of Whitmarsh*, 7 B. & C. 596; *Smith* v. *Sparrow*, 4 Bing. 84; *Peate* v. *Dicken*, 1 Cr., M. & R. 422; *Scarfe* v. *Morgan*, 4 M. & W. 270.

(*t*) Judgm., *Fennell* v. *Ridler*, 5 B. & C. 408, explaining Lord Mansfield's remarks in *Drury* v. *De la Fontaine*, 1 Taunt. 135.

instance, cannot maintain an action upon a contract for the sale and warranty of a horse made by him upon a Sunday (*u*); though, if the contract be not completed on the Sunday, it will not be affected by the statute (*x*).

It has been decided by the House of Lords, that an apprentice to a barber could not be compelled to shave his master's customers on a Sunday, and that all sorts of handicraft are illegal which are not works of necessity, mercy, or charity (*y*).

Where, in an action of assumpsit for breach of the warranty of a horse, the defendant alone was in the exercise of his ordinary calling, and it appeared that the plaintiff did not know what his calling was, so that, in fact, the defendant was the only person who had violated the statute:—The Court held that it would be against justice to allow the defendant to take advantage of his own wrong, so as to defeat the rights of the plaintiff, who was innocent (*z*). And for the like reason, in an action by the indorsee against the acceptor of a bill of exchange which was drawn on a Sunday, it was held that the plaintiff might recover, there being no evidence that it had been accepted on that day; but the Court said, that, if it had been accepted on a Sunday, and such acceptance had been made in the ordinary calling of the defendant, and if the plaintiff was acquainted with this circumstance when he took the bill, he would be precluded from recovering on it, though the defendant

(*u*) *Fennell* v. *Ridler*, 5 B. & C. 406.

(*x*) *Bloxsome* v. *Williams*, 3 B. & C. 232; *Smith* v. *Sparrow*, 4 Bing. 84. See also *Williams* v. *Paul*, 6 Bing. 653 (observed upon in *Simpson* v. *Nicholls*, 3 M. & W. 240); *Beaumont* v. *Brengeri*, 5 C. B. 301; *Norton* v. *Powell*, 4 M. & Gr. 42.

(*y*) *Phillips* v. *Innes*, 4 Cl. & Fin 234.

(*z*) *Bloxsome* v. *Williams*, 3 B. & C. 232, cited 5 B. & C. 408, 409.

would not be permitted to set up his own illegal act as a defence to an action at the suit of an innocent holder (*a*). A bill of exchange falling due on a Sunday is payable on the preceding day.

A person, however, can commit but one offence on the same day by exercising his worldly calling in violation of the statute of Charles; and if a justice of the peace convict him in more than one penalty for the same day, it is an excess of jurisdiction (*b*).

Recent Legislation.

By a recent Act, 43 & 44 Vict. c. 48, s. 1, no prosecution or other proceeding can be instituted for an offence against the 29 Car. 2, c. 7, except with the consent in writing of the chief officer of police of the district or of two Justices of the Peace.

Another Act, viz., 21 Geo. 2, c. 49, imposes a penalty of £200 for opening houses, rooms, or other places of entertainment on Sunday (*c*). It was a matter of doubt whether the Crown had power to remit the whole or any part of this severe penalty, but the statute 38 & 39 Vict. c. 80, removes this doubt, and expressly confirms the power of the Crown in this matter.

In addition to the class of cases decided under the "Lord's Day Act," we may refer to one of a somewhat different description, in which, however, the principle of public policy which dictated that statute was discussed. In the case alluded to, a question arose as to the validity of a bye-law, by which the navigation of a certain canal

(*a*) *Beybie* v. *Levi*, 1 Cr. & J. 180.

(*b*) *Crepps* v. *Durden*, Cowp. 640; cited 4 R. & B. 322. See, as to circumstances under which cumulative penalties may be recovered for separate acts, *Milne* v. *Bale*, L. R. 10 C. P. 591; 44 L. J. C. P. 336.

(*c*) *Terry* v. *Brighton Aquarium Co.*, L. R. 10 Q. B. 306; 44 L. J. M. C. 173; 32 L. T. 458; *Girdlestone* v. *The Same*, 4 Ex. D. 107; 48 L. J. Ex. 373; 27 W. R. 523.

was ordered to be closed on every Sunday throughout the year (works of necessity only excepted). In support of this bye-law was urged the reasonableness of the restriction sought to be imposed thereby, and its conformity in spirit and tendency with those enactments by which Sunday trading is prohibited; the Court, however, held that the navigation company had no power, under their Act, to make the bye-law in question, their power being confined to the making of laws for the government and orderly use of the navigation, but not extending to the regulation of moral or religious conduct, which must be left to the general law of the land, and to the laws of God (*c*). A railway company is bound to deliver up luggage deposited at the luggage and cloak office on Sunday as on other days, unless protected by special condition printed on the receipt ticket (*d*).

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§ II.—RULES OF LEGISLATIVE POLICY.

In this section certain maxims are considered relating to the operation of statutes, and the leading canons of their construction. These maxims are three in number: 1st, that a later shall repeal an earlier and conflicting statute; 2ndly, that laws shall not have a retrospective operation; and, 3rdly, that enactments should be framed with a view to ordinary rather than extraordinary occurrences. We shall hereafter have occasion to consider the

(*c*) *Calder and Hebble Nav. Co.* v. *Pilling*, 14 M. & W. 76.

(*d*) *Stallard* v. *Great Western R. Co.*, 2 B. & S. 419.

rules applicable to the construction of statutes, and may, for the present, confine our attention to the maxims of legislative policy just enumerated.

LEGES POSTERIORES PRIORES CONTRARIAS ABROGANT. (1 *Rep.* 25 b.)—*When the provisions of a later statute are opposed to those of an earlier, the earlier statute is considered as repealed.*

Clausula derogatoria.

The legislature which possesses the supreme power in the State, possesses, as incidental to that power, the right of changing, modifying and abrogating the existing laws. To assert that any one Parliament can bind a subsequent Parliament by its ordinances, would in fact be to contradict the above plain proposition; if, therefore, an Act of Parliament contains a clause, "that it shall not be lawful for the King, by authority of Parliament, during the space of seven years, to repeal and determine the same Act," such a clause, which is technically termed "*clausula derogatoria*," will be simply void, and the Act may, nevertheless, be repealed within the seven years (*e*), for *non impedit clausula derogatoria quo minus ab eâdem potestate res dissolvantur a quibus constituentur* (*f*). And again, *perpetua lex est nullam legem humanam ac positivum perpetuam esse, et clausula quæ abrogationem excludit ab initio non valet* (*f*). The principle thus set forth seems to be of universal application, and it will be remembered that, as regards our own Parliament, an Act may now be altered, amended, or repealed in the same

(*e*) Bac. Max., reg. 19. (*f*) *Id.*

session in which it is passed, "any law or usage to the contrary notwithstanding" (*g*).

It is then an elementary and necessary rule, that a prior statute shall give place to a later—if the two cannot be reconciled—*Les posterior derogat priori* (*h*). *Non est novum ut priores leges ad posteriores trahantur* (*i*) provided the intention of the legislature to repeal the previous statute be expressed in clear and unambiguous language, and be not merely left to be inferred from the subsequent statute (*k*). For a more ancient statute will not be repealed by a more modern one, unless the later expressly negative the former, or unless the provisions of the two statutes are manifestly repugnant, in which latter case the earlier enactment will be impliedly modified or repealed (*l*). It should be remembered that repeal by implication is never to be favoured; it is no doubt the necessary consequence of inconsistent legislation, whenever it occurs, but which must not be imputed to the legislature unless absolutely necessary (*m*). Beyond the reproach of inconsistency, the repeal itself casts a reflection upon the wisdom of former Parliaments (*n*).

"The rule," says Lord *Hardwicke*, "touching the re-

(*g*) 13 & 14 Vict. c. 21, s. 1.

(*h*) See Mackeld Civ. L. 5.

(*i*) D. 1. 3. 26. *Constitutiones tempore posteriores potiores sunt his quæ ipsas præcesserunt.* D. 1. 4. 4. A rule of court may be overridden by a statute; see *Harris* v. *Robinson*, 2 C. B. 908.

(*k*) See *Phipson* v. *Harvett*, 1 Cr., M. & R. 473; judgm., *Reg.* v. *St. Edmund's, Salisbury*, 2 Q. B. 84.

(*l*) Gr. & Rud. of Law, 190; arg. *Reg.* v. *Mayor of London*, 13 Q. B. 1; 19 Vin. Abr. 525, "*Statutes*," (E. 6) pl. 132; See *per* Lord Kenyon, C. J., *Williams* v. *Pritchard*, 4 T. R. 2, 4; *Ablert* v. *Pritchard*, L. R. 1 C. P. 210; *Rix* v. *Borton*, 12 A. & E. 470; *Dakins* v. *Seaman*, 9 M. & W. 777. See Wilberforce on Stats., pp. 311 *et seq.*

(*m*) *Per* Field, J., *Dobbs* v. *G. Junction Waterworks*, 9 Q. B. D. 158; 51 L. J. Q. B. 504; 46 L. T. 820 (H. L. Nov. 30th, 1883). Vin. Abr. "*Statutes*" (E. 6), 132, cited arg. *Phipson* v. *Harvett*, 1 Cr., M. & R. 481.

(*n*) Dwarr. Stats., 2nd ed., 533.

peal of laws, is *leges posteriores priores contrarias abrogant;* but subsequent Acts of Parliament, in the affirmative, giving new penalties, and instituting new methods of proceeding, do not [*necessarily* (*o*)] repeal former methods and penalties of proceeding, ordained by preceding Acts of Parliament, without negative words" (*p*). Nor does an affirmative statute giving a new right of itself of necessity destroy a previously existing right, unless the intention of the legislature be apparent that the two rights should not exist together (*q*). In order to repeal an existing enactment, a statute must have either express words of repeal (*r*), or must be contrary to, or inconsistent with, the provisions of the law said to be repealed, or at least mention must be made of that law, showing an intention of the framers of the later Act of Parliament to repeal the former (*s*). But "the law will not allow the

(*o*) *Michell* v. *Brown*, 1 E. & E. 267, 274, where Lord Campbell, C. J., observes: "If a later statute again describes an offence created by a former statute, and affixes a different punishment to it, varying the procedure, &c., giving an appeal where there was no appeal before, we think that the prosecutor must proceed for the offence under the later statute. If the later statute expressly altered the quality of the offence, as by making it a misdemeanor instead of a felony, or a felony instead of a misdemeanor, the offence could not be proceeded for under the earlier statute, and the same consequence seems to follow from altering the procedure and the punishment." See *Evans* v. *Rees*, 9 C. B. N. S. 391.

(*p*) *Middleton* v. *Crofts*, 2 Atk. 674, cited *Wynn* v. *Davis*, 1 Curt. 79. Vin. Abr. "*Statutes*" (E. 6), pl. 132, cited arg. *Macdougall* v. *Paterson*, 11 C. B. 767.

(*q*) *O'Flaherty* v. *M'Dowell*, 6 H. L. Cas. 142, 157.

(*r*) "It is a rule of law that one *private* Act of Parliament cannot repeal another, except by express enactment." *Per* Turner, L. J., *Trustees of Birkenhead Docks* v. *Birkenhead Dock Co.*, 23 L. J., Ch. 457; S. C., 4 De G., M., & G. 732; *Purnell* app., *Wolverhampton New Waterworks Co.* resp., 10 C. B. N. S. 597, 591.

(*s*) *Per* Sir H. Jenner, 1 Curt. 80. See also the cases cited; arg. *Reg.* v. *Mayor of London*, 13 Q. B. 1; *Bramston* v. *Mayor, &c., of Colchester*, 6 E. & B. 246; *Parry* v. *Croydon Commercial Gas and Coke Co.*, 11 C. B. N. S. 579; *Great*

exposition to revoke or alter by construction of general words any particular statute, where the words may have their proper operation without it" (*t*).

Where, then, both Acts are merely affirmative, and the substance such that both may stand together, the later does not repeal the former, but they shall both have concurrent efficacy (*u*). For instance, if, by a former law, an offence be indictable at the quarter sessions, and the later law makes the same offence indictable at the assizes; here the jurisdiction of the sessions is not taken away, but both have concurrent jurisdiction, and the offender may be prosecuted at either, unless the new statute subjoins express negative words—as that the offence shall be indictable at the assizes, and not elsewhere (*x*). So, the general rule of law and construction undoubtedly is, that, where an Act of Parliament does not create a duty or offence, but only adds a remedy in respect of a duty or offence which existed before, it is to be construed as cumulative; this rule must, however, in each particular case, be applied with due attention to the language of the Act of Parliament in question (*y*). If, for example, a crime be created

Central Gas Co. v. *Clarke*, 11 C. B. N. S. 814, 835, 841; S. C. 13 *Id.* 838; *Daw* v. *Metropolitan Board of Works*, 12 C. B. N. S. 161; *Michell* v. *Brown*, 1 E. & E. 267.

(*t*) *Lyn* v. *Wyn*, O. Bridgm. Judgments, 122, 127; cited *per* Smith, J., *Conservators of the Thames* v. *Hall*, L. R. 3 C. P. 421; *Thorpe* v. *Aldous*, L. R. 6 C. P.; *per* Bovill, C. J. *The Clan Gordon*, 7 P. D. 190; 46 L. T. 490; 30 W. R. 691.

(*u*) *Dr. Foster's case*, 11 Rep. 62, 63; *Stuart* v. *Jones*, 1 E. & B. 22; arg. *Ashton* v. *Poynter*, 1 Cr., M. & R. 739; *R.* v. *Aslett*, 1 B. & P., N. R. 7; *Langton* v. *Hughes*, 1 M. & S. 597; *Hill* v. *Hall*, 1 Ex. D. 411; 45 L. J. M. C. 153; Com. Dig. "*Parliament*" (R. 9).

(*x*) 1 Black. Com. 93. See also the arguments in *Reg.* v. *St. Edmund's, Salisbury*, 2 Q. B. 72; *Reg.* v. *Justices Suffolk*, *Id.* 85. And see *Reg.* v. *Deane*, 2 Q. B. 96.

(*y*) Judgm., *Richards* v. *Dyke*, 3 Q. B. 268; *Michell* v. *Brown*, 1 E. & E. 267. See *Thibault* v. *Gibson*, 12 M. & W. 88.

by statute, with a given penalty, and be afterwards repeated in a subsequent enactment with a lesser penalty attached to it, the new Act would in effect, operate to repeal the former penalty (*z*).

Effect of Repeal.

It has long been established, that, when an Act of Parliament is repealed, it must be considered (except as to transactions passed and closed) as if it never had existed (*a*). But where a statute is incorporated by reference into a second statute the repeal of the first by a third does not affect the second (*b*). By Act of Parliament the liability to repair certain highways in a parish was taken from the parish and cast upon certain townships in which the highways respectively were, a form of indictment being given by the Act against such townships for non-repair, which would have been insufficient at common law. One of the townships was indicted under the Act which before trial was repealed without any reference to depending prosecutions: the Court of Queen's Bench arrested a judgment given against the township on such indictment (*c*).

There is, moreover, a difference to be remarked between *temporary* statutes and statutes which have been repealed; for, although the latter (except so far as they relate to transactions already completed under them) become as if

(*z*) *Henderson* v. *Sherborne*, 2 M. & W. 239; cited and approved in *Robinson* v. *Emerson*, 4 H. & C. 355; *per* Lord Abinger, C. B., *A. G.* v. *Lockwood*, 9 M. & W. 391; *R.* v. *Davis*, Leach, C. C., 271; *Wrightup* v. *Greenacre*, 10 Q. B. 1, recognising *Pilkington* v. *Cooke*, 16 M. & W. 615; *A. G.* v. *Moore*, L. R. 3 Ex. D. 276.

(*a*) *Per* Lord Tenterden, C. J., *Surtees* v. *Ellison*, 9 B. & C. 752; cited by Quain, J., L. R. 8 Q. B. 5; *Dean* v. *Mellard*, 15 C. B. N. S. 19, 25; *per* Lord Campbell, C. J., *Reg.* v. *Inhabs. of Denton*, 18 Q. B. 770; *Taylor* v. *Vansittart*, 4 E. & B. 910; *per* Parke, B., *Simpson* v. *Ready*, 11 M. & W. 346.

(*b*) *Clarke* v. *Bradlaugh*, 8 Q. B. D. 69 (C. A.); 51 L. J. Q. B. 1; 46 L. T. 49.

(*c*) *Reg.* v. *Inhabs: of Denton*, 18 Q. B. 761. See *Foster* v. *Pritchard*, 2 H. & N. 151.

they had never existed, yet, with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction (*d*).

Formerly, when a statute which repealed another was itself subsequently repealed, the first statute was—if nothing inconsistent with such an intention appeared (*e*)—thereby revived, without any formal words for that purpose; and it is now expressly enacted that "where any Act repealing in whole, or in part, any former Act, is itself repealed, such last repeal shall not revive the Act or provisions before repealed," unless words be added, reviving them (*f*). Also, wherever "any Act shall be made repealing in whole or in part any former Act, and substituting some provision or provisions instead of the provision or provisions repealed, such provision or provisions so repealed shall remain in force until the substituted provision or provisions shall come into operation by force of the last made Act" (*g*).

When Act begins to operate.

Prior to the stat. 33 Geo. 3, c. 13, it was not possible to know the precise day on which an Act of Parliament received the royal assent, and all Acts passed in the same session of Parliament were considered to have received the royal assent on the same day, and were referred to the first day of the session; but, by the above statute, it is provided that a certain parliamentary officer, styled "the clerk of the Parliaments," shall indorse, on every Act of Parliament, "the day, month, and year, when the same shall have passed and shall have received the royal

(*d*) *Per* Parke, B., *Stevenson* v. *Oliver*, 8 M. & W. 241.

(*e*) *Hellawell* v. *Eastwood*, 6 Exch. 295.

(*f*) 13 & 14 Vict. c. 21, s. 5.

(*g*) *Id.* s. 6. See *Levi* v. *Sanderson*, L. R. 4 Q. B. 330; *Mirfin* v. *Attwood*, *ib.*; *Mount* v. *Taylor*, L. R. 3 C. P. 645; *Butcher* v. *Henderson*, L. R. 3 Q. B. 335.

assent, and such indorsement shall be taken to be a part of such Act, and to be the date of its commencement, where no other commencement shall be therein provided." When, therefore, two Acts, passed in the same session of Parliament, are repugnant or contradictory to each other, that Act which last received the royal assent will prevail, and will have the effect of repealing wholly, or *pro tanto*, the previous statute (*h*). The same principle, moreover, applies where the proviso of an Act is directly repugnant to the purview of it; for in this case the proviso shall stand, and will be held to be a repeal of the purview, as it speaks the last intention of the makers (*i*).

Common law gives place to statute.

Not merely does an old statute give place to a new one, but, where the common law and the statute differ, the common law gives place to the statute (*k*), if expressed in negative terms (*l*). And, in like manner, an ancient custom may be abrogated and destroyed by the express provisions of a statute; or where inconsistent with and repugnant to its positive language (*m*). But "the law and custom of England cannot be changed without an Act of Parliament, for this, that the law and custom of England is the inheritance of the subject, which he cannot be deprived of without his assent in Parliament" (*n*).

Statutes, however, "are not presumed to make any alteration in the common law, further or otherwise than

(*h*) *R.* v. *Justices of Middlesex*, 2 B. & Ad. 818; *Paget* v. *Foley*, 2 Bing. N. C. 691.

(*i*) *A. G.* v. *Chelsea Waterworks Co.*, Fitzgib. 195, cited 2 B. & Ad. 826.

(*k*) Co. Litt. 115 b.; *Paget* v. *Foley*, 2 Bing. N. C. 629; *per* Lord Ellenborough, C. J., *R.* v. *Asleett*, 1 N. R. 7; *Dresser* v. *Bosanquet*, 4 B. & S. 460, 486.

(*l*) Bac. Abr., 7th ed., "*Statute*" (G).

(*m*) *Merchant Taylor's Co.* v. *Truscott*, 11 Exch. 855; *Salter's Co.* v. *Jay*, 3 Q. B. 109; *Huxham* v. *Wheeler*, 3 H. & C. 75.

(*n*) 12 Rep. 29.

the Act does expressly declare; therefore, in all general matters the law presumes the Act did not intend to make any alteration, for, if Parliament had had that design they would have expressed it in the Act" (*o*).

NOVA CONSTITUTIO FUTURIS FORMAM IMPONERE DEBET NON PRÆTERITIS. (2 *Inst.* 292.)—*A legislative enactment ought to be prospective, not retrospective, in its operations.*

Rule derived from civil law.

Every statute which takes away or impairs a vested right acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect of transactions or considerations already past, must be deemed retrospective (*p*) in its operation, and opposed to sound principles of jurisprudence (*q*). In the Roman law we find it laid down generally, that *nemo potest mutare consilium suum in alterius injuriam* (*r*); and this maxim has, by the civilians (*s*) been specifically applied as a restriction upon the lawgiver, who was thus forbidden to change his mind to the prejudice of a vested right; and that this interpretation of the rule is at all events in strict conformity with the spirit of the civil law appears clearly by a reference to the Code where the principle, which we here propose to consider, is

(*o*) *Per* Trevor, C. J., 11 Mod. 150. See 26 & 27 Vict. c. 125, s. 1.

(*p*) *Per* Story, J., 2 Gallis (U.S.) R. 139. In the judgment of Kent, C. J., *Dash* v. *Van Kleek*, 7 Johns. (U.S.) R. 503 *et seq.*, the rule as to *nova constitutio* is fully considered, and various cases and authorities upon this subject are reviewed.

(*q*) Instances of retrospective legislation are given in the arg. *The Wiltes Peerage*, L. R. 4 H. L. 146.

(*r*) D. 50. 17. 75.

(*s*) Taylor, Elem. Civ. Law, 168.

thus stated: *Leges et constitutiones futuris certum est dare formam negotiis, non ad facta præterita revocari; nisi nominatim et de præterito tempore et adhuc pendentibus negotiis cautum sit* (*t*). Laws should be construed as prospective, not as retrospective, unless they are expressly made applicable to past transactions, and to such as are still pending (*u*). Nevertheless an intention on the part of the legislature that an Act of Parliament shall be retrospective, is sometimes inferred without express words, from the subject matter of the Act. Thus alterations in Procedure have always a retrospective effect unless some good reason appears to the contrary, so also alterations in the law with respect to evidence in matters both civil and criminal (*x*).

It is, however, in general true, that a statute shall not be so construed as to operate retrospectively, or to take away a vested right, unless it contain either an enumeration of the cases in which it is to have such an operation or words which can have no meaning unless such a construction is adopted (*y*).

On various occasions it has, in accordance with the above doctrine, been laid down, that, where the law is altered by statute pending an action, the law, as it existed when the action was commenced, must decide the rights of the parties in the suit, unless the legislature express a clear

Examples.

(*t*) Cod. 1, 14, 7.

(*u*) See 15 Tyng. (U.S.) R. 454.

(*x*) *Gardner* v. *Lucas*, L. R. 3 App. Cas. 582. *Per* Lord Blackburn, p. 603; v. also judgment of Lord Cairns. *Phillips* v. *Eyre*, L. R. 6 Q. B. 1; 40 L. J. Q. B. 28; *Wright* v. *Hale*, 6 H. & N. 227, 230, 232; followed in *Kimbray* v. *Draper*, L. R. 3 Q. B. 160,

(*y*) 7 Bac. Abr., 7th ed., "*Statute*" (C), p. 439. See *Latless* v. *Holmes*, 4 T. R. 660; cited *Whitaker* v. *Wisbey*, 12 C. B. 52; *Doe* d. *Johnson* v. *Liversedge*, 11 M. & W. 517; *Dash* v. *Van Kleek*, 7 Johnson (U.S.), R. 477; *Quilter* v. *Mapleson*, 9 Q. B. D. 1, 672, *per* Jessel, M. R. (C. A.).

intention to vary the relation of litigant parties to each other (*z*). The Statute of Frauds (29 Car. 2, c. 3) was passed in 1676, and by sect. 4 provides, that, from and after the 14th June, 1677, no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, &c., unless the agreement upon which such action shall be brought, or some memorandum thereof shall be in writing, and signed by the party or some other person thereunto by him lawfully authorised; and the question was, whether a promise of marriage made before the new Act, but to be performed after, would sustain an action without note in writing. The Court were of opinion that the action lay, notwithstanding the statute, which it was agreed did not extend to promises made before the 14th of June; and judgment was given for the plaintiff (*a*).

Moon v. *Durden* (*b*) may be cited as a leading decision in reference to the application of the above maxim. The 8 & 9 Vict. c. 109, s. 18, which received the royal assent on the 8th August, 1845, enacts that, "all contracts and agreements by way of gaming and wagering shall be null and void; and that no suit shall be brought or *maintained* in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in

(*z*) *Hitchcock* v. *Way*, 6 A. & E. 943, 951; *Paddon* v. *Bartlett*, 3 A. & E. 895, 896; *per* Lord Abinger, C. B., *Chappell* v. *Purday*, 12 M. & W. 305, 306.

(*a*) *Gilmore* v. *Shuter*, Jones, R. 108; S. C., 2 Lev. 227.

(*b*) 2 Exch. 22, recognised in *Pettamberdass* v. *Thackoorseydass*, 7 Moore, P. C. C. 239; arg. *James* v. *Isaacs*, 12 C. B. 795; *Pinhorn* v. *Souster*, 8 Exch. 138, 142; *Hobson* v. *Neale*, *Id.* 131; *Vansittart* v. *Taylor*, 4 E. & B. 910; *Langton* v. *Haynes*, 1 H. & N. 366: *Reg.* v. *Inhabs. of Madeley*, 15 Q. B. 43; *Harris* v. *Lawrence*, 1 Exch. 697; *Parker* v. *Crouch*, *Id.* 699. See also *A. G.* v. *Sillem*, 10 H. L. Cas. 704,

the hands of any person to abide the event upon which any wager shall have been made:" this section was held not to defeat an action for a wager which had been commenced before the passing of the Act. In the case just cited, *Parke*, B., observes that the language of the clause above set out, if taken in its ordinary sense, "applies to all contracts both past and future, and to all actions both present and future on any wager whether past or future." But it is as Lord *Coke* says, "a rule and law of Parliament that regularly *nova constitutio futuris formam imponere debit non præteritis*. This rule, which is in effect that enactments in a statute are generally to be construed to be prospective, and intended to regulate the future conduct of persons, is deeply founded in good sense and strict justice, and has been acted upon in many cases (*c*). * * * But this rule, which is one of construction only, will certainly yield to the intention of the legislature; and the question in this and every other similar case is, whether that intention has been sufficiently expressed." In this case *Rolfe*, B., also remarks that the principle as to *nova constitutio* "is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively" (*d*). To a like effect, in *Marsh* v. *Hig-*

(*c*) Citing *Gilmore* v. *Shuter*, T. Jones, 108; S. C., 2 Shaw, 16; *Edmonds* v. *Lawley*, 6 M. & W. 235; *Moore* v. *Phillippe*, 7 M. & W. 536.

(*d*) Bearing upon the above subject, see *Smallcombe* v. *Olivier*, 13 M. & W. 77, 87; *A. G.* v. *Bristol Waterworks Co.*, 10 Exch. 884; *Elliott* v. *Bishop*, *Id.* 927; *Boole* v. *Davis*, 8 Exch. 351; *Waugh* v. *Middleton*, *Id.* 352; *Larpent* v. *Bibby*, 5 H. L. Cas. 481; *A. G.* v. *Marquis of Hertford*, 3. Exch. 670, 687, 688; *Reg.* v. *Inhabs. of St. Mary, Whitechapel*, 12 Q. B. 120; *Leary* v. *Patrick*, 15 Q. B. 266, 271;

gins (*e*), *Wilde*, C. J., says that "sometimes, no doubt, the legislature finds it expedient to give a retrospective operation to an Act to a considerable extent; but then care is always taken to express that intention in clear and unambiguous language." And by a like rule of construction have the courts been guided in construing the first (*f*) and fourteenth (*g*) sections of "The Mercantile Law Amendment Act, 1856."

In the case of *Reg.* v. *Vine* (*h*), the question of retrospectiveness was discussed in connection with the Act 33 & 34 Vict. c. 29, s. 14, which enacts that everyone convicted of felony shall for ever be disqualified from selling spirits by retail, and the question was raised whether the licence held by a person who had been convicted of felony before the passing of the Act became void upon that event. It was held that it did, because, in words of *Cockburn*, C. J.: "Here the object of the enactment is not to punish offenders, but to protect the public against publichouses being kept by persons of doubtful character." It is different where the primary object of a statute is penal, "because it manifestly shocks our sense of justice, that an act, legal at the time of doing it, should be made unlawful by some new enactment" (*i*).

Limitation of rule.

Where, indeed, the words of a statute are manifest

Mackenzie v. *Sligo and Shannon R. Co.*, 18 Q. B. 862; *per* Williams, J., *Upton* v. *Townend*, 17 C. P. 50; *Reg.* v. *Inhabs. of Christchurch*, 12 Q. B. 149.

(*e*) 9 C. B. 551, 567, and cases there cited. There is no rule of law which prohibits a retrospective rate: from the language of the Act under which it is laid must be gathered the intention of the legislature; *Harrison* v. *Stickney*, 2 H. L. Cas. 108, 125.

(*f*) *Williams* v. *Smith*, 4 H. & N. 559; S. C., 2 *Id.* 443.

(*g*) *Jackson* v. *Woolley*, 8 E. & B. 778, 784.

(*h*) L. R. 10 Q. B. 195; 44 L. J. M. C. 60. See also *Ansdell* v. *Ansdell*, 5 P. D. 138.

(*i*) *Per* Erle, C. J., 10 C. B. N. S. 191.

and plain, the Court will give effect to them, notwithstanding any particular hardship, inconvenience, or detriment, which may be thereby occasioned. For instance, by letters patent granted to the plaintiff, it was amongst other things provided that, if he should not particularly describe and ascertain the nature of his invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled in Her Majesty's High Court of Chancery within four calendar months next and immediately after the date of the said letters patent, then the said letters patent should become void. By an Act of Parliament, 4 & 5 Vict. c. 1, subsequently obtained, which recited that letters patent had been granted to the plaintiff; that the specification was enrolled within six months, instead of being enrolled within four months after the date thereof, as required by the letters patent; that such non-enrolment had arisen from inadvertence and misinformation; and that it was expedient that the patent should be rendered valid to the extent thereinafter mentioned: it was enacted, that the letters patent should during the remainder of the term, be considered, deemed, and taken to be as valid and effectual to all intents and purposes as if the specification thereunder so enrolled by the plaintiff within six months after the date thereof, had been enrolled within four months. In a case for infringement of the patent by the defendant, who had himself obtained letters patent for a *bonâ fide* improvement upon the plaintiff's invention prior to the passing of the said Act of Parliament, and at a time when the plaintiff's patent had ceased to have any validity, by reason of its non-enrolment: it was held, that the Act of Parliament in question operated as a complete confirmation of the

Exceptions.

plaintiff's patent, although such a construction imposed upon the defendant the hardship of having his patent destroyed by an *ex post facto* law (*k*).

The preceding may perhaps be considered a strong, but is by no means a solitary, instance (*l*) of a statute being held to have a retrospective operation. Thus, the plaintiff sued in Hilary Term, 1829, for a debt which had accrued due more than six years previously: it was held that the statute 9 Geo. 4, c. 14, which came into operation on the 1st January, 1829, precluded him from recovering on an oral promise to pay the debt made by defendant in February, 1828 (*m*). In this case the action was brought *after* the statute had begun to operate; but the same principle was applied where the action was brought *before*, though not tried till *after*, the statute came in force (*n*). There are, moreover, several authorities for extending remedial enactments to inchoate transactions (*o*), yet these appear to have turned on the peculiar wording of particular Acts, which seemed to the Court to compel them to give the law an *ex post facto* operation (*p*). We may also, in connection with this part of the subject, observe that where an Act of Parliament is passed to correct an

(*k*) *Stead* v. *Carey*, 1 C. B. 496. See further as to retrospective statutes *per* Dr. Lushington, *The Ironsides*, Lush. Adm. R. 465.

(*l*) See, as to stat. 2 & 3 Vict. c. 37, s. 1, *Hodgkinson* v. *Wyatt*, 4 Q. B. 749: as to stat. 6 & 7 Vict. c. 73, s. 37, *Brooks* v. *Bockett*, 9 Q. B. 847: as to stat. 20 & 21 Vict. c. 85, s. 21, *Midland R. C.* app., *Pye* resp., 10 C. B. N. S. 179: as to stat. 21 & 22 Vict. c. 90, *Wright* v. *Greenroyd*, 1 B. & S. 758, 762.

(*m*) *Towler* v. *Chatterton*, 6 Bing. 258, recognized in *Reg.* v. *Leeds and Bradford R. C.*, 18 Q. B. 343. See also *Bradshaw* v. *Tasker*, 2 My. & K. 221; *Pourdrin* v. *Gowdey*, 3 My. & K. 383.

(*n*) *Kirkhaugh* v. *Herbert*, and an anonymous case, cited 6 Bing. 265.

(*o*) See the cases cited, arg. 6 A. & E. 946, and *supra*.

(*p*) Judgm., 6 A. & E. 951. See *Burn* v. *Carvalho*, 1 A. & E. 895.

error by omission in a former statute of the same session, it relates back to the time when the first Act passed, and the two must be taken together as if they were one and the same Act, and the first must be read as containing in itself in words the amendments supplied by the last (*q*).

Criminal cases.

The injustice and impolicy of *ex post facto* (*r*) or retrospective legislation are yet more apparent with reference to criminal laws (*s*) than to such as regard property or contracts; and with reference to the operation of a new criminal law, the maxim of Paulus (*t*), adopted by Lord *Bacon* applies, *nunquam crescit ex post facto præteriti delicti æstimatio*, the law does not allow a later fact, a circumstance or matter subsequent, to extend or amplify an offence: it construes neither penal laws nor penal facts by intendment, but considers the offence in degree as it stood at the time when it was committed (*u*).

AD EA QUÆ FREQUENTIUS ACCIDUNT JURA ADAPTANTUR. (2 *Inst.* 137.)—*The laws are adapted to those cases which most frequently occur.*

Laws ought to be, and usually are, framed with a view to such cases as are of frequent rather than such as are

(*q*) 2 Dwarr. Stats. 685.

(*r*) As to the meaning and derivation of this expression, see note, 2 Peters (U.S.), R. 683.

(*s*) "There can," moreover, "be no doubt that every so-called Indemnity Act involves a manifest violation of justice, inasmuch as it deprives those who have suffered wrongs of their vested right to the redress which the law would otherwise afford them, and gives immunity to those who have inflicted those wrongs." Judgm., *Phillips* v. *Eyre*, L. R. 4 Q. B. 242.

(*t*) D. 50. 17. 138. § 1.

(*u*) Bac. Max., reg. 8.

of rare or accidental occurrence, or, in the language of the civil law, *jus constitui oportet in his quæ ut plurimum accidunt non quæ ex inopinato* (*x*); for, *neque leges neque senatus-consulta ita scribi possunt ut omnes casus qui quandoque inciderint comprehendantur, sed sufficit ea quæ plerumque accidunt contineri* (*y*), laws cannot be so worded as to include every case which may arise, but it is sufficient if they apply to those things which most frequently happen. All legislation proceeds upon the principle of providing for the ordinary course of things(*z*), and to this principle frequent reference is to be found in the reports in answer to arguments, often speciously advanced, that the words of an Act of Parliament cannot have a particular meaning, because in a certain contingency that meaning might work a result that nobody would approve of. In the case of *Sir David Salomons* (*a*), it was contended that Parliament could not have intended a Jew upon taking his seat to use the words "on the true faith of a Christian," prescribed in the oath of affirmation of 6 Geo. 3, c. 53, because the same oath might under 1 Geo. 1. st. 2, c. 13, be exacted from any one suspected of popery at the discretion of two Justices of the Peace, and any one who refused should be deemed a popish recusant, and as such should forfeit the prescribed penalties, and be proceeded against; and this in the case of a Jew, it was

(*x*) D. 1. 3. 3. See Lord Camden's judgment in *Entick* v. *Carrington*, 18 How. St. Tr. 1061. Sir R. Atkyns observes, that "laws are fitted *ad ea quæ frequentius accidunt*, and not for rare and extraordinary events and accidents." See his "Enquiry into the Power of dispensing with Penal Statutes," cited 11 St. Tr. 1208. "The rule is *ad ea quæ frequentius accidunt leges adaptantur*," *per* Bramwell, B., 9 H. L. Cas. 52; *per* Willes, J., 10 H. L. Cas. 429.

(*y*) D. 1. 3. 10.

(*z*) *Per* Blackburn, J., *Maxted* v. *Paine*, L. R. 6 Exch. 132, 172; 40 L. J. Ex. 57; 24 L. T. 149.

(*a*) *Miller* v. *Salomons*, 7 Exch. 475; 8 *Id.* 778 (Exch. Ch.).

said, would be the merest tyranny. But Baron *Parke* (*b*) in that case thus replied to the argument:—"If in the vast majority of possible cases—in all of ordinary occurrence—the law is in no degree inconsistent or unreasonable, construed according to its plain words, it seems to me to be an untenable proposition, and unsupported by authority, to say that the construction may be varied in *every* case, because there is one possible but highly improbable one in which the law would operate with great severity, and against our own notions of justice. The utmost that can be reasonably contended is, that it should be varied in that particular case, so as to obviate that injustice—no further."

Another illustration of the maxim is afforded by the case of *St. Margaret's Burial Board* v. *Thompson* (*c*). There the right of a sexton of a parish to enter and perform his functions upon burial ground formed under 15 & 16 Vict. c. 85, s. 32, was contested, and it was urged that the Act could not be supposed to confer such an absolute right, because by the common law the rector could have dismissed the sexton, or excluded him from the churchyard in the event of his drunkenness or misbehaviour. The Court, however, considered that the Act should be construed as "framed with a view to the ordinary position of rector and sexton in respect of the latter's duties."

Where a private Act of Parliament, intituled, "An Act to enable the N. Union Society for Insurance against Loss by Fire, to sue in the name of their Secretary, and to be sued in the names of their Directors, Treasurers, and Secretary," enacted that all actions and suits might be commenced in the name of the secretary, as nominal plaintiff: it was held that this Act did not enable the

(*b*) 7 Exch. p. 549. (*c*) L. R. 6 C. P. 445.

secretary to petition, on behalf of the society, for a commission of bankruptcy against their debtor; for the expression "to sue," generally speaking, means to bring actions, and the legislature was providing for every-day not for exceptional occurrences (*d*).

Again, where the construction of the stat. 11 Geo. 2, c. 19, which gives a remedy to a landlord whose tenant has fraudulently removed goods from the demised premises, unless they have been *bonâ fide* sold to one not privy to the fraud, was under consideration; and it was urged that it ought to be implied that the landlord was not empowered by the statute to enter the close of a third person, or to break his locks, for the purpose of seizing the goods, unless he was a party to, or at least cognizant of, their fraudulent removal; and further that the breaking open of his gates without a previous request to open them was unjustifiable: the Court held that neither of these conditions need be observed as necessary to the exercise of the right given by the statute, "for, generally, goods fraudulently removed are not secreted in a man's close or house without his privity or consent. The legislature may be presumed to have had this (*e*) in their contemplation: *ad ea quæ frequentius accidunt jura adaptantur*."

The reader will also find the maxim forcibly applied by Lord *Blackburn* in *Dixon* v. *Caledonian Railway Co.* (*f*), and two other judgments (*g*) of the same great authority,

(*d*) *Guthrie* v. *Fisk*, 3 B. & C. 178. Arg. *A. G.* v. *Jackson*, Cr. & J. 108; Wing. Max. 716. *Argumentum à communiter accidentibus in jure frequens est*, Gothofred, ad D. 44. 2. 6.

(*e*) *Williams* v. *Roberts*, 7 Exch. 618, 628; see *Thomas* v. *Watkins*, *Id.*, 630.

(*f*) 5 App. Cas. 838.

(*g*) *Clarke* v. *Wright*, 6 H. & N. 862; *Dalton* v. *Angus*, L. R. 6 App. Cas. 818.

demonstrate that it has force, not only as a canon of construction of statute law, but also as a principle of the common law.

Casus omissus.

It is then true, that, "when the words of a law extend not to an inconvenience rarely happening, but do to those which often happen, it is good reason not to strain the words further than they reach, by saying it is *casus omissus*, and that the law intended *quæ frequentius accidunt*." "But," on the other hand, "it is no reason, when the words of a law do enough extend to an inconvenience seldom happening, that they should not extend to it as well as if it happened more frequently, because it happens but seldom" (*h*). Where, however, a *casus omissus* does really occur in a statute, either through the inadvertence of the legislature (*i*), or on the principle *quod semel aut bis existi prætereunt legislatores* (*k*), the rule is, that the particular case thus left unprovided for, must be disposed of according to the law as it existed prior to such statute —*Casus omissus et oblivioni datus dispositioni communis juris relinquitur* (*l*); "a *casus omissus*," observes *Buller*, J. (*m*), "can in no case be supplied by a Court of Law, for that would be to make laws."

(*h*) Vaugh. R. 373; *Fenton* v. *Hampton*, 11 Moore, P. C. C. 365; with which acc. *Doyle* v. *Falconer*, L. R. 1 P. C. 328.

(*i*) *Reg.* v. *Inhabs. of Denton*, 5 B. & S. 821, 828; *Cobb* v. *Mid Wales R. C.*, L. R. 1 Q. B. 348, 349.

(*k*) D. 1. 3. 6.

(*l*) 5 Rep. 38. See *Robinson* v. *Cotterell*, 11 Exch. 476.

(*m*) *Jones* v. *Smart*, 1 T. R. 52; *per* Lord Abinger, C.B., *Lane* v. *Bennett*, 1 M. & W. 73; arg. *Shepherd* v. *Hills*, 11 Exch. 64.

CHAPTER II.

MAXIMS RELATING TO THE CROWN.

THE principal attributes of the Crown are sovereignty or pre-eminence, perfection, and perpetuity; and these attributes are attached to the wearer of the crown by the constitution, and may be said to form his constitutional character and royal dignity. On the other hand, the principal duty of the sovereign is to govern his people according to law; and this is not only consonant to the principles of nature, of liberty, of reason, and of society, but has always been esteemed an express part of the common law of England, even when prerogative was at the highest. In the pages immediately following are collected some of the more important technical rules, embodying the above general attributes of the Crown, with remarks as to their meaning and qualifications (*a*).

REX NON DEBET ESSE SUB HOMINE, SED SUB DEO ET SUB LEGE, QUIA LEX FACIT REGEM. (*Bract. Lib.* i. *fo.* 5.)—*The king is under no man, yet he is in subjection to God and to the law, for the law makes the king.*

Two-fold character of the sovereign.

The head of the state is regarded by our law in a two-fold character—as an individual liable like any other to

(*a*) See further, on the subject of this chapter, Mr. Allen's Treatise on the Royal Prerogative, ed. 1849, and Mr. Chitty's Treatise on the Pre-

the accidents of mortality and its frailties; also as a corporation sole (*b*), endowed with certain peculiar attributes, the recognition whereof leads to important consequences. Politically, the sovereign is regarded in this latter character, and is invested with various functions, which the individual, as such, could not discharge. "The person of the king," it has been said (*c*), "is by law made up of two bodies: a natural body, subject to infancy, infirmity, sickness, and death; and a political body, perfect, powerful, and perpetual." These two bodies are inseparably united together, so that they may be distinguished, but cannot be divided. More often, however, the sovereign would seem to be regarded by our law in his political than in his individual and natural capacity, and the attributes of his former are blended with those of his latter character. As conservator of the public peace, the Crown in any criminal proceeding represents the community at large, prosecutes for the offence committed against the public, and can alone exercise the prerogative of pardoning. As the fountain of justice, no Court can have compulsory jurisdiction over the sovereign; an action for a personal wrong, therefore, will not lie against the king; for which rule, indeed, another more technical reason has been assigned—that the king cannot by his writ command himself to appear *coram judice*. As the dispenser of law and equity,

rogative of the Crown, particularly chaps. i., ii., xv., xvi.; 1 Com. by Broom & Hadley, chap. vii.; Fortescue de Laud. Leg. Ang., by Amos, chap. ix.; Finch's Law, 81; Plowd. Com., chap. xi.; Bracton, chap. viii.

(*b*) Mr. Allen, however, observes, at page 6 of his Treatise on the Royal Prerogative, that "there is something higher, more mysterious, and more remote from reality in the conception which the law of England forms of the king than enters into the notion of a corporation sole."

(*c*) Bagshaw, Rights of the Crown of England, 29; Plowd. 212 a, 217 a, 238; Allen, Royal Pre. 26: Bac. Abr. Prerogative (E. 2).

the king is present in all his Courts; whence it is that he cannot be nonsuit in an action, nor does he appear by attorney (*d*).

The king is beneath the law.

The *case of Prohibitions* (*e*) shows, however, that the king is not above the law, for he cannot in person assume to decide any case, civil or criminal, but must do so by his judges; the law being "the golden met-wand and measure to try the causes of the subjects, and which protected his majesty in safety and peace,"—the king being thus in truth, *sub Deo et lege*. This case shows also that an action will not lie against the Crown for a personal tort, for it is there laid down that "the king cannot arrest a man for suspicion of treason or felony, as others of his lieges may;" the reason given being that if a wrong be thus done to an individual, the party grieved cannot have remedy against the king. But although in these and other respects, presently to be noticed, the king is greatly favoured by the law, being exempted from the operation of various rules applicable to the subject, he is on the whole, and essentially, beneath not superior to it, theoretically in some respects above, but practically bound and directed by its ordinances (*f*).

(*d*) 1 Black. Com. 323; Finch's Law (by Pickering), 82.

(*e*) *Prohibitions del Roy*, 12 Rep. 63; Plowd. 241, 553.

(*f*) See the Debate in the House of Lords on Life Peerages, Hansard, vol. 140, pp. 263, &c. In *Howard* v. *Gosset*, 10 Q. B. 386, Coleridge, J., observes that "the law is supreme over the House of Commons *as over the Crown itself*;" *et vide post*, p. 53.

REX NUNQUAM MORITUR. (*Branch, Max. 5th ed.*, 197.)—*The king never dies.*

Immortality ascribed theoretically to the king.

The law ascribes to the king, in his political capacity, an absolute immortality; and immediately upon the decease of the reigning prince in his natural capacity, the kingly dignity and the prerogatives and politic capacities of the supreme magistrate, by act of law, without any interregnum or interval, vest at once in his successor, who is, *eo instante*, king, to all intents and purposes; and this is in accordance with the maxim of our constitution, *In Angliâ non est interregnum* (*g*).

"It is true," says Lord *Lyndhurst* (*h*), "that *the king never dies*, the demise is immediately followed by the succession, there is no interval; the sovereign always exists, the person only is changed."

So tender, indeed, is the law of supposing even a possibility of the death of the sovereign, that his natural dissolution is generally called his demise—*demissio regis vel coronæ*—an expression which signifies merely a transfer of property; and when we speak of the demise of the Crown, we mean only that, in consequence of the disunion of the king's natural body from his body politic (*i*), the kingdom is transferred or demised to his successor; and so the royal dignity remains perpetual. It has, doubtless, usually been thought prudent, when the sovereign has been of tender years, at the period of the devolution upon him of the royal dignity, to appoint a protector, guardian, or regent to discharge the functions of royalty for a limited time; but the very necessity of such extraordinary

(*g*) Jenk. Cent. 205. See Cooper's Account of Public Records, vol. 2, 323, 324. Allen, Royal Prerog. 44.

(*h*) *Visc. Canterbury* v. *A. G.*, 1 Phill. 322.

(*i*) *Ante*, p. 41.

provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority (*k*), for he has no legal guardian; and the appointment of a regency must, therefore, be regarded merely as a provision made by the legislature, in order to meet a special and temporary emergency (*l*).

It seems that the Duchy of Cornwall vests in the king's eldest son and heir apparent at the instant of his birth, without gift or creation, and as if minority could no more be predicated of him than of the sovereign himself (*m*).

The title of the sovereign is regulated by succession as well as descent, and if lands be given to the king and his "heirs," this word "heirs" will be held to include the "successors" to the Crown, although on the demise of the sovereign, according to the course of descent recognised at the common law, the land might have gone in some other channel. Hence, if the king die without issue male, but leaving two daughters, lands held to him and his heirs will go to his eldest daughter as succeeding to the Crown; whereas, in the case of a subject, lands whereof he was seised would pass to his daughters, in default of male issue, as coparceners (*n*). Similarly, if real estate be given to the king and his heirs, and afterwards the reigning dynasty be changed, and another family be placed upon the throne, the land in question would go to the successor, and then descend in the new line (*o*). And a grant of land to the king for ever creates in him an estate of perpetual inheri-

(*k*) Bac. Abr. Prerogative (A.).

(*l*) 1 Black. Com., 295; 1 Plowd. 177, 234. And see the Stat. 3 & 4 Vict. c. 52.

(*m*) *Per* Lord Brougham, C., Coop. R. 125.

(*n*) Grant on Corporations, 627. See also the Stats. 25 & 26 Vict. c. 37, and 36 & 37 Vict. c. 61, relating to the private estates of the Sovereign.

(*o*) Grant, Corp. 627.

tance (*p*), whereas the like words would but give an estate for life to any of his subjects.

In regard also to personal property, the Crown is differently circumstanced from an individual or from a corporation sole; for, according to the ordinary rule, such property will not, in the case of a corporation sole, go to the successor—in the king's case, by our common law, it does so (*q*). And it may be worthy of remark, that the maxim, "the king never dies," founded manifestly on notions of expediency, and on the apprehension of danger which would result from an interregnum, does not hold in regard to other corporations sole. A parson, for instance, albeit clothed with the same rights and reputed to be the same person as his predecessor, is not deemed by our law to be continuously in possession of his office, nor is it deemed essential to the preservation of his official privileges and immunities that one incumbent should, without any interval of time or interruption, follow another. Such a corporation sole may, during an interval of time, cease to be visibly *in esse*, whereas the king never dies—his throne and office are never vacant.

Yet it would be an error to say that this fiction of the constitution as to the continuity of the Royal Person is always followed to its logical conclusions. One limitation is illustrated by the case of *The Att. Gen.* v. *Köhler* (*r*), in which the question was discussed in the House of Lords, whether money which had through mistake been paid to the Treasury during the reign of one sovereign, could be recovered under his successor. It was held that the sovereign could not be responsible for money paid over in

(*p*) 2 Black. Com. 216.
(*q*) Grant, Corp. 626.
(*r*) 9 H. L. Ca. 654.

error to and spent by a predecessor, which that predecessor might lawfully have disposed of for his own use, supposing it to have rightfully come to his hands.

REX NON POTEST PECCARE. (2 *Rolle, R.* 304.)—*The king can do no wrong.*

Meaning of maxim.

It is an ancient and fundamental principle of the English constitution, that the king can do no wrong (*s*). But this maxim must not be understood to mean that the king is above the laws, in the unconfined sense of those words, and that everything he does is of course just and lawful. Its true meaning is, First, that the sovereign, individually and personally, and in his natural capacity, is independent of and is not amenable to any other earthly power or jurisdiction; and that whatever may be amiss in the condition of public affairs is not to be imputed to the king, so as to render him answerable for it personally to his people. Secondly, the above maxim means, that the prerogative of the Crown extends, not to do any injury, because, being created for the benefit of the people, it cannot be exerted to their prejudice, and it is therefore a fundamental general rule, that the king cannot sanction any act forbidden by law; so that, in this point of view, he is under, and not above the laws,—and is bound by them equally with his subjects (*t*). If, then, the sovereign personally command an unlawful act to be done, the offence of the instrument is not thereby indemnified; for though the king is not himself under the coercive power of the law, yet in many

(*s*) Jenk. Cent. 9, 308.
(*t*) Chitt. Pre. Cr. 5; Jenk. Cent. 203. See Fortescue de Laud. Leg. Ang. (by Amos) 28.

cases his commands are under the directive power of the law, which makes the act itself invalid if unlawful, and so renders the instrument of execution thereof obnoxious to punishment (*u*). As in affairs of state the ministers of the Crown are held responsible for advice tendered to it, or even for measures which might possibly be known to emanate directly from the sovereign, so may the agents of the sovereign be civilly or criminally answerable for lawless acts done—if that may be imagined—by his command.

Grant from Crown when void.

The king, moreover, is not only incapable of doing wrong, but even of thinking wrong. Whenever, therefore, it happens that, by misinformation or inadvertence, the Crown has been induced to invade the private rights of any of its subjects,—as by granting any franchise or privilege to a subject contrary to reason, or in any way prejudicial to the commonwealth or a private person,—the law will not suppose the king to have meant either an unwise or an injurious action, for *eadem mens præsumitur regis quæ est juris et quæ esse debet præsertim in dubiis* (*x*), but declares that the king was deceived in his grant; and thereupon such grant becomes void upon the supposition of fraud and deception either by or upon those agents whom the Crown has thought proper to employ (*y*). In like manner, also, the king's grants are void whenever they tend to prejudice the course of public justice (*z*). And, in brief, to use the words of a learned judge (*a*), the Crown cannot, in derogation of the right of

(*u*) 1 Hale, P. C., 43, 44, 127. *Per* Coleridge, J., *Howard* v. *Gossett*, 10 Q. B. 386.

(*x*) Hobart, 154.

(*y*) *Gledstanes* v. *The Earl of Sandwich*, 5 Scott, N. R. 719; *R.* v. *Kempe*, 1 Lord Raym. 49, cited *Id.* 720; Finch's Law, 101; *Vigers* v. *Dean, &c., of St. Paul's*, 14 Q. B. 909.

(*z*) Chitt. Pre. Cr. 385.

(*a*) See *per* Platt, B., 2 E. & B. 884.

the public, unduly limit and fetter the exercise of the prerogative which is vested in the Crown for the public good. The Crown cannot dispense with anything in which the subject has an interest (*b*), nor make a grant in violation of the common law of the land (*c*), or injurious to vested rights (*d*). In this manner it is, that, while the sovereign himself is, in a personal sense, incapable of doing wrong, yet his acts may in themselves be contrary to law, and, on that account, be avoided or set aside by the law.

It must further be observed, that even where the king's grant purports to be made *de gratiâ speciali, certâ scientiâ, et mero motu*, the grant will, nevertheless, be void, if it appears to the Court that the king was deceived in the purpose and intent thereof: and this agrees with a text of the civil law, which says, that the above clause *non valet in his in quibus præsumitur principem esse ignorantem;* therefore, if the king grant such an estate as by law he could not grant, forasmuch as the king was deceived in the law, his grant will be void (*e*). Thus the Crown cannot by grant of lands and tenements create in them a new estate of inheritance, or give them a new descendible quality (*f*), and the power of the Crown is alike restricted as regards the grant of a peerage or honour (*g*).

It does not seem, however, that the above doctrine can be extended to invalidate an act of the legislature, on the ground that it was obtained by a *suggestio falsi*, or

(*b*) *Thomas* v. *Waters*, Hardr. 443, 448.

(*c*) 2 Roll. Abr. 164.

(*d*) *R.* v. *Butler*, 3 Lev. 220; cited *per* Parke, B., 2 E. & B. 894.

(*e*) *Case of Alton Woods*, 1 Rep. 53.

(*f*) *Per* Lord Chelmsford, *The Wiltes Peerage*, L. R. 4 H. L. 152.

(*g*) *The Wiltes Peerage*, L. R. 4 H. L. 126; and see *Buckhurst Peerage Case*, 2 App. Cas. 1, *per* Lord Cairns, pp. 20, 21.

suppressio veri. It would indeed be something new, as forcibly observed by *Cresswell*, J. (*h*), to impeach an Act of Parliament by a plea stating that it was obtained by fraud (*i*).

In connection with this part of our subject, it is worthy of remark, that the power which the Crown possesses of calling back its grants, when made under mistake, is not like any right possessed by individuals; for, when it has been deceived, the grant may be recalled notwithstanding any derivative title depending upon it, and those who have deceived it must bear the consequences (*k*).

Patent

The doctrine just stated applies also in the case of a patent which has in some way improvidently emanated from the Crown. Thus, in *Morgan* v. *Seaward* (*l*), *Parke*, B., observed as follows: "That a false suggestion of the grantee avoids an ordinary grant of lands or tenements from the Crown, is a maxim of the common law, and such a grant is void, not against the Crown merely, but in a suit against a third person (*m*). It is on the same principle that a patent for two or more inventions, where one is not new, is void altogether, as was held in *Hill* v. *Thompson* (*n*), and *Brunton* v. *Hawkes* (*o*); for although the statute (*p*) invalidates a patent for want of novelty, and consequently by force of the statute the patent would be void, so far as related to that which was old; yet the

(*h*) *Stead* v. *Carey*, 1 C. B. 516; *per* Tindal, C. J. *Id.* 522.

(*i*) See *M'Cormick* v. *Grogan*, L. R. 4 H. L. 96, *per* Ld. Westbury.

(*k*) Judgm. *Cumming* v. *Forrester*, 2 Jac. & W. 342.

(*l*) 2 M. & W. 544, cited arg. *Nickels* v. *Ross*, 8 C. B. 710; *Beard* v. *Egerton*, *Id.* 207; *Croll* v. *Edge*, 9 C. B. 486. See *Reg.* v. *Betts*, 15 Q. B. 540, 547.

(*m*) Citing *Travell* v. *Carteret*, 3 Lev. 135; *Alcock* v. *Cooke*, 5 Bing. 340.

(*n*) 8 Taunt. 375.

(*o*) 4 B. & Ald. 542.

(*p*) 21 Jac. 1, c. 3.

principle on which the patent has been held to be void altogether is, that the consideration for the grant is the novelty of all, and the consideration failing, or, in other words, the Crown being deceived in its grant (*q*), the patent is void, and no action maintainable upon it" (*r*).

The rule upon the subject now touched upon has been yet more fully laid down (*s*), as follows:—"If the king has been deceived by any false suggestion as to what he grants or the consideration for his grant; if he appears to have been ignorant or misinformed as to his interest in the subject-matter of his grant; if the language of his grant be so general, that you cannot in reason apply it to all that might literally fall under it; or if it be couched in terms so uncertain that you cannot tell how to apply it with that precision which grants from one so especially representing the public interest ought in reason to have; or if the grant reasonably construed would work a wrong, or something contrary to law; in these and such like cases the grant will be either wholly void or restrained according to circumstances; and equally so, whether the technical words, *ex certâ scientiâ et mero motu*, be used or not. But this is held upon the very same principle of construction on which a grant from a subject is construed, viz., the duty of effectuating the intention of the grantor." To hold the grants valid or unrestrained in the cases just put, would be, as is said, *in deceptione domini regis*, and not *secundum intentionem*. It must, however, at the

(*q*) 5 & 6 Will. 4, c. 83, s. 1, allows a disclaimer of part of a patent.

(*r*) "The Crown is deceived if it grants a patent for an invention which is not new," *per* Pollock, C. B., *Hills* v. *London Gas Light Co.*, 5 H. & N. 340.

(*s*) *Reg.* v. *Eastern Archipelago Co.*, 1 E. & B. 310, 337, 338; S. C., 2 E. & B. 856; *The Wiltes Peerage*, L. R. 4 H. L. 126.

same time be noted, that long modern possession will often make good and valid a title defective on account of vagueness or uncertainty in the original grant. This is effected by a presumption of a supplementary and confirmatory grant, so as to preserve the fiction of royal impeccability (*t*).

Petition of Right.

The principle that the king can do no wrong brought about the institution of the Petition of Right, by which a subject practically can obtain redress in all cases where his rights have been invaded or infringed by the Crown through its agents, and proceeds upon the theory that the king, of his free will, graciously orders right to be done (*soit droit fait al partie*). Where Petition of Right is not available as a means of obtaining redress for the act of a servant of the Crown, it is because the principle of *respodneat superior* has no application; and in such cases an action will be against the servant himself. This is the remedy in the case of a tortious act, or of the breach of a contract entered into outside the scope of an official's authority.

Procedure.

The procedure (*u*) in Petition of Right is not affected by the Judicature Acts of 1873 or 1875, and is still regulated by the Act 23 & 24 Vict. c. 34, which had for its object to render that procedure less intricate and expensive. By this statute it is provided that the petition shall be left with the Secretary of State for the Home Department for Her Majesty's consideration, who, if she shall think fit, may grant her fiat that right be done, (on which fiat no fee or reward is to be taken), whereupon (the

(*t*) *Des Barre* v. *Shey*, 29 L. T. 592.

(*u*) The procedure before the Act mentioned in the text, is succinctly described by Blackstone, 3, 256, and more at length in Chitty on the Prerogative. It is well illustrated in the *Baron de Bode's Case*, 8 Q. B. 208.

fiat having been served on the solicitor to the Treasury), an answer, plea, or demurrer shall be made on behalf of the Crown, and the subsequent proceedings be assimilated as far as possible to the proceedings of an ordinary action (*x*). Nevertheless, there are some important differences, for instance, the suppliant, though himself bound to give discovery as in an ordinary action (*y*), is not entitled to have it at the hands of the Crown (*z*). It is obvious that execution of a judgment in the proper sense of the term, cannot be had against the Sovereign. Formerly, if the question was determined against the Crown, the judgment was that of *ouster le main*, or *amoveas manus*—or, in full, *quod manus domini regis amoveantur et possessio restituatur petenti salvo jure domini regis;* which last clause, says Blackstone (*a*), is always added to judgments against the king, to whom no *laches* is ever imputed, and whose right, till some late statutes, was never defeated by any limitation or length of time. And by such judgment the Crown is immediately out of possession; so that there needs not the indecent interposition of his own officers to transfer the seizin from the king to the party aggrieved. By the statute above mentioned it is provided that the Court may give judgment that the suppliant is entitled to the whole or any portion of the relief sought, or to such other relief as to the Court may seem right, and that such judgment shall have the same effect as a judgment of *amoveas manus* (*b*). Costs, also, are to follow the same rules as prevail in actions between subject and subject (*c*).

(*x*) For illustration see *Tobin* v. *Reg.*, 16 C. B. N. S. 310.

(*y*) *Tomline* v. *Reg.* 4 Ex. D. 252; 48 L. J. Ex. 453; *Thomas* v. *The Queen*, L. R. 10 Q. B. 44.

(*z*) *Thomas* v. *Reg.*, L. R. 10 Q. B. 44; 44 L. J. Q. B. 67.

(*a*) iii. 257.

(*b*) 23 & 24 Vict. c. 34, ss. 9, 10.

(*c*) s. 12.

Whether the subject has a right to the royal fiat to his petition has been much discussed. It would seem clear that, under the statute 23 & 24 Vict. c. 34, at any rate, the Courts have no jurisdiction until this has been done, and that a minister who refused the royal sanction in a proper case would be amenable to Parliament alone. It is evident from the Act of Parliament that it was intended to leave some discretion to the Crown, otherwise the fiat of the Sovereign would have been dispensed with. The royal fiat.

Cases may easily be conceived in which the interests of the State would forbid the publication in open court of matter which an aggrieved party might consider necessary for his case. On the other hand, notwithstanding the supplicating language of the petition, it never was the theory of the Constitution that the remedy by petition of right was one of pure grace and favour on the part of the Crown. Although the petition may contain nothing of a mandatory nature, "it is, substantially as well as nominally, a petition of *right*" (*d*), and the prayer of it is grantable, "*ex debito justitiæ*" being referred by many to the words of Magna Charta, *nulli negabimus justitiam vel rectum* (*e*). "I am far from thinking," said Lord Langdale, "that it is competent to the king, or rather to his responsible advisers, to refuse capriciously, to put into a due course of investigation, any proper question raised on a petition of right. The form and application being, as it is said, to the grace and favour of the king appear no foundation for any such suggestion" (*f*). It is now the common practice

(*d*) Chitty Prerog. 345.

(*e*) There would appear to be ground for saying that previous to Ed. I. the king could be sued by a subject, and that the form of petition was instituted as more compatible with the king's dignity.

(*f*) *Ryves* v. *Duke of Wellington*, 9 Beav. 600. *V.* also Coke Inst. 3, 240, 2.

of the Home Office to endorse "let right be done" as a matter of course, without even referring the case to the Attorney-General (*g*).

Where Petition of Right will lie.

Even where the royal fiat is obtained, the question may still be raised by the Crown, (and this is done generally upon demurrer,) as to whether the case is one in which petition of right may be brought. The only cases in which petition of right is open to the subject are, where the land, or goods, or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or if restitution cannot be given, compensation in money, or where the claim arises out of a contract as for goods supplied to the Crown for the public service (*h*). It is also the proper method of recovering damages for a breach of contract on the part of the Crown (*i*). In considering whether, in any individual case, recourse should be had to Petition of Right, it must be borne in mind that the petition is founded on the violation of some right in respect of which, but for the immunity from all process with which the law surrounds the person of the sovereign, an action at law or in equity might be maintained.

Thus in the case of a breach of contract entered into between a subject and the servants of the Crown, whether redress should be sought by petition from the sovereign as the principal, or by action from the officer as an agent who has made himself personally liable, will depend

(*g*) *Per* Jervis, C. J., *Eastern Archipelago Co.* v. *Reg.* 2 E. B. 914. See, however, a pamphlet (published by V. & R. Stephens, 1863), on the case of Mr. Irwin, in which there is much interesting matter as to Petition of Right collected.

(*h*) *Per* Cockburn, C. J. *Feather* v. *Reg.*, 6 B. & S. 294.

(*i*) Chitty Prerog. 341-5, where the cases in which petition may be employed are set out.

upon those broad principles of the Common Law which regulate the relationship between principal, agent, and third parties. Where a servant of the Crown has entered into a contract within the scope of his authority and duty, no action will lie against him for its breach. The remedy of the subject in such case is by petition of right (*k*). Since a petition must show on the face of it some ground of complaint which, but for the inability of the subject to sue the sovereign, might be made the subject of judicial proceeding, it follows that no petition of right can be brought in respect of a wrong or tortious act properly so called, suffered by a subject at the hands of the Crown or its servants (*l*). Redress cannot be had by petition even for the negligence of the servants of the sovereign (*m*). For apart altogether from the question of procedure, a petition of right in respect of a wrong, in the legal sense of the term, shows no right to legal redress against the sovereign. If the king cannot do wrong, he cannot authorise a wrong, for in law the act is the act of him by whose authority it is done. By parity of reasoning the king cannot be held responsible for the negligence of his servants, because the principle upon which a master is liable for his servant's negligence proceeds upon the assumption that the master himself was negligent in the choice and employment of the servant. But in all cases of tort an action will lie against the person who has committed it, for the civil irresponsibility of the supreme power could not be

(*k*) *Churchward* v. *Reg.*, 6 B. & S. 807 (contract for carriage of mails); *Thomas* v. *Reg.*, L. R. 10 Q. B. 31; 44 L. J. Q. B. 17 (contract by minister of war with an inventor of ordnance); *Palmer* v. *Hutchinson*, 6 App. Cas. 619, 50 L. J. P. C. 62 (commissariat).

(*l*) *Tobin* v. *Reg.*, 16 C. B. N. S. 310, 33 L. J. C. P. 83; *Feather* v. *Reg.*, 6 B. & S. 257; 30 L. J. Q. B. 200.

(*m*) *Vis. Canterbury* v. *Att.-Gen.* 1 Phillips, 321.

maintained with any show of reason if its agents were not personally responsible (*n*). So in *Madrazo* v. *Willes* (*o*), a captain of a British man-of-war who had destroyed a Spanish trader wrongfully, but, as he believed, in performance of his duty, was held liable to the Spanish owners. Moreover, that a servant of the Crown is liable to the subject for a tortious act done even with the sanction of the highest authority of the State, "rests on principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of the Crown on the one hand, and the rights and liberties of the subject on the other" (*p*).

Questions of greater difficulty have arisen with respect to claims to participate in funds which the Crown has become possessed of in war, or by convention with foreign states, the distribution of which has been regulated by Act of Parliament or the will of the sovereign. Thus, in the case of *Kinloch* v. *The Secretary of State for India* (*q*), where the Queen had by Royal Warrant granted the Banda and Kirwee Booty to the Secretary of State for India, "in trust" for the officers and men of certain forces, to be distributed according to certain scales and proportions, any doubts arising to be determined finally by him, unless the Queen should otherwise order, an attempt was made to compel the Secretary of State to account for those moneys, on the footing of a trust, to persons who claimed to be entitled to a share in them. It was held by the House of Lords, affirming the Court of Appeal, that the warrant did not transfer the property or create a trust which could

(*n*) *Rogers* v. *Rajendoo Dutt*, 13 M. P. C. 236.

(*o*) 3 B. & Ald. 353; and see *Tobin* v. *Reg.* and *Feather* v. *Reg.*, *ubi supra*.

(*p*) *Feather* v. *Reg.*, 6 B. & S. *et ubi supra*.

(*q*) 7 App. Cas. 619,

be enforced in equity, and that no action could properly be brought against the Secretary of State, who was merely the agent of the Crown for a specific purpose.

Whether upon petition of right the suppliant would in such a case be entitled to recover may be doubtful. Probably a Royal Warrant has not the effect of an Act of Parliament, which has been held to preclude all claims against the Crown by prescribing a particular mode for the distribution of such funds (*r*). This was the ground of the decision of the Exchequer Chamber and the House of Lords in the important case of *Baron de Bode* (*s*). There the petition suggested that under certain conventions with the Government of France the Crown had awarded moneys for the purpose of indemnifying British subjects whose property had been confiscated by French authorities during the wars following the French Revolution. The suppliant, as one entitled to participate, claimed a large sum which remained in the Treasury after the claims of others had been satisfied. It was held, however, that Parliament, which was competent to do whatever it liked with the money, having provided for its application by the statute 59 Geo. 3, c. 31, the case must turn entirely on the construction and effect of that statute. "If," said *Parke*, B., delivering the judgment of the Court (*t*), "no Act of Parliament had passed for the application of this money, it might have been a question whether the British sovereign could have applied it for

(*r*) *Cooper* v. *Rey.* 14 Ch. D. 311; 49 L. T. Ch. 490; 42 L. T. 617.

(*s*) 8 Q. B. 208; 13 Q. B. 380 (Exch. Ch.); 3 H. L. 449. In this case the arguments in the Q.B. were of the most elaborate nature, and all the older authorities in Petition of Right are collected. It is worthy of note that it was contended by the Crown that petition of right would not lie for debt or damages. The contrary was assumed but not decided by the Court.

(*t*) 13 Q. B. 383.

any purpose that he chose. It might have been contended that, as it was received by him expressly as the price of a release of the French Government from its obligation to compensate his subjects for their losses, he took the money clothed with a similar obligation to distribute it amongst his subjects by way of compensation;" and if so, that such subjects had a remedy by petition of right. He added that it was unnecessary to give an opinion on such a supposed case. The point there suggested has been since discussed and become the subject of judicial decision in the case of *Rustomjee* v. *The Queen* (*u*). In that case the suppliant claimed to participate in a sum of 3,000,000 dollars which had been received by the Crown from the Emperor of China in pursuance of the treaty of Nanking (1842) on account of debts due from certain Chinese merchants licenced to deal with foreigners, who had become insolvent, being largely indebted to British merchants who had been compelled to deal exclusively with them. The notion that the sovereign could, in receiving a sum of money under treaty, become the agent of or trustee for her subjects was described by Cockburn, C. J., as wild and untenable, and that case clearly settles that in performing or in making a treaty the sovereign exercises her highest prerogative, and her acts cannot be examined in her own Courts.

Monstrans de droit.

Closely analogous to petition was the form of *Monstrans de droit* (*x*). This procedure was employed in former times when the facts upon which the suppliant and the Crown relied had already been established, whether by commission, inquest of office, or otherwise, and

(*u*) 1 Q. B. D. 487; 2 Q. B. D. 69; 46 L. J. Q. B. 238; 25 W. R. 333. Note also that in this case it was held that the Crown cannot plead the Statute of Limitations.

(*x*) Chitty, Prerog.

the judgment of the Court was required as upon a special case. Although now obsolete, this form of procedure was once of very great importance, and almost superseded that by petition (*y*).

Where title of Crown is indirectly questioned.

Where the Crown is actually in possession of lands or chattels, we have seen that its title can only be directly questioned by petition of right. There sometimes arises a question between subject and subject in which the rights of the Crown may turn out to be indirectly involved, so that a judgment as between the parties will affect the interest of the Crown. In such cases, as for example in an action concerning the property of an outlaw, the Attorney-General must have notice of the proceedings, and be made a party, otherwise the Courts will not adjudicate. The necessity of making the Attorney-General a party also extends to cases where the sovereign is interested as *parens patriæ*, or protector of the rights of his subjects, as for instance in actions concerning testamentary dispositions where the subject-matter is appropriated for general charitable purposes.

NON POTEST REX GRATIAM FACERE CUM INJURIA ET DAMNO ALIORUM. (3 *Inst.* 236.)—*The king cannot confer a favour on one subject which occasions injury and loss to others.*

It is an ancient and constant rule of law (*z*), that the king's grants are invalid when they destroy or derogate

(*y*) Black. Com. iii. 256.

(*z*) 3 Inst. 236; Vaugh. R. 338. The maxim commented on *supra*, was cited *per* Talfourd, J., in the *Eastern Archipelago Co.* v. *Reg.*, 2 E. & B. 864. A similar doctrine prevailed in the civil law. See Cod. 7, 38, 2.

from rights, privileges, or immunities previously vested in another subject: the Crown, for example, cannot enable a subject to erect a market or fair so near that of another person as to affect his interests therein (*a*). Nor can the king grant the same thing in possession to one, which he or his progenitors have granted to another (*b*). If the king's grant reciting that A. holds the manor of Blackacre for life, grants it to B. for life: in this case the law implies that the second grant is to take effect after the determination of the first (*c*). And if the king being tenant for life of certain land, grant it to one and his heirs, the grant is void, for the king has taken upon himself to grant a greater estate than he lawfully could grant (*d*).

On the same principle, the Crown cannot *at common law* (*e*) pardon an offence against a penal statute after information brought, for thereby the informer has acquired a private property in his part of the penalty. Nor can the king pardon a private nuisance while it remains unredressed, or so as to prevent an abatement of it, though afterwards he may remit the fine; and the reason is that

(*a*) Chitt. Pre. Cr. 119, 132, 386; *Earl of Rutland's Case*, 8 Rep. 57; *Alcock* v. *Cooke*, 5 Bing. 340; *Gledstanes* v. *Earl of Sandwich*, 5 Scott, N. R. 689, 719. *Re Islington Market Bill*, 3 Cl. & F. 513. See *Mayor of Exeter* v. *Warren*, 5 Q. B. 773.

(*b*) *Per* Cresswell, J., 1 C. B. 523; arg. *R.* v. *Amery*, 2 T. R. 565; Chitt. Pre. Cr. 125. But the grant of a mere licence or authority from the Crown, or a grant during the king's will is determined by the demise of the Crown. (*Id.* 400. See n. (*a*), *supra*.

(*c*) *Earl of Rutland's case*, 8 Rep. 56 *b*.

(*d*) *Case of Alton Woods*, 1 Rep. 44 *a*.

(*e*) By Stat. 22 Vict. c. 32, the Crown is empowered "to remit, in whole or in part, any sum of money which, under any Act now in force, or hereafter to be passed, may be imposed as a penalty or forfeiture on a convicted offender, although such money may be, in whole or in part, payable to some party other than the Crown."

though the prosecution is vested in the Crown, to avoid multiplicity of suits, yet (during its continuance) this offence savours more of the nature of a private injury to each individual in the neighbourhood, than of a public wrong (*f*). So, if the king grant lands, forfeited to him upon a conviction for treason, to a third person, he cannot afterwards, by his grant, devest the property so granted in favour of the original owner.

NULLUM TEMPUS OCCURRIT REGI. (2 *Inst.* 273.)—*Lapse of time does not bar the Right of the Crown.*

In pursuance of the principle already considered, of the sovereign's incapability of doing wrong, the law also determines that in the Crown there can be no negligence or laches; and, therefore, it was formerly held, that no delay in resorting to his remedy would bar the king's right; for the time and attention of the sovereign must be supposed to be occupied by the cares of government, nor is there any reason that he should suffer by the negligence of his officers, or by their fraudulent collusion with the adverse party (*g*); and although, as we shall hereafter see, the maxim *vigilantibus et non dormientibus jura subveniunt* is a rule for the subject, yet *nullum tempus occurrit regi* is, in general, the king's plea (*h*). From this doctrine it followed, not only that the civil claims of the Crown sustained no prejudice by lapse of time, but that criminal prosecutions for felonies or

(*f*) Vaugh. R. 338.

(*g*) Godb. 295; Hobart, 347; Bac. Abr., 7th ed., "*Prerogative*," (E. 6); *ante*, p. 62.

(*h*) Hobart, 347.

misdemeanours might be commenced at any distance of time from the commission of the offence; and this is, to some extent, still law, though it has been qualified by the legislature in modern times; *ex. gra.* by stat. 9 Geo. 3, c. 16, in suits relating to landed property, the lapse of sixty years and adverse possession for that period operate as a bar even against the prerogative, in derogation of the above maxim (*i*), that is, provided the acts relied upon as showing adverse possession are acts of ownership done in the assertion of a right, and not mere acts of trespass not acquiesced in on the part of the Crown (*k*). Again, although the Statute of Limitations, 21 Jac. 1, c. 16, s. 3, does not bind the king (*l*), by 32 Geo. 3, c. 58, the Crown is barred, in informations for usurping corporate offices or franchises, by the lapse of six years; and different statutes have imported into our criminal jurisprudence various periods of limitation for crimes (*m*).

An important instance of the application of the doctrine, *nullum tempus occurrit regi*, presents itself where church preferment lapses to the Crown. Lapse is a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary, by neglect of the patron to present,—to the metropolitan, by neglect of the ordinary, —and to the Crown, by neglect of the metropolitan: the term in which the title to present by lapse accrues from

(*i*) See *Doe* d. *Watt* v. *Morris*, 2 Scott, 276; *Goodtitle* v. *Baldwin*, 11 East, 488, and Att.-Gen. for *British Honduras* v. *Bristowe*, 6 App. Cas. 143; 50 L. J. P. C. 15.

(*k*) *Doe* d. *William IV.* v. *Roberts*, 13 M. & W. 520. "The Crown certainly may dedicate a road o the public, and be bound by long acquiescence in public user;" *per* Lord Denman, C.J., *Reg.* v. *East Mark*, 11 Q.B. 882-3.

(*l*) Judgm. *Lambert* v. *Taylor*, 4 B. & C. 151, 152; Bac. Abr., 7th ed., "*Prerogative*" (E. 5).

(*m*) Archbold, Cr. Pl. 19th ed., 79, 80.

one of the above parties to the other is six calendar months, after the expiration of which period the right becomes forfeited by the person neglecting to exercise it. But no right of lapse can accrue when the original presentation is in the Crown; and in pursuance of the above maxim, if the right of presentation lapses to the Crown, prerogative intervenes, and, in this case, the patron shall never recover his right till the Crown has presented; and if, during the delay of the Crown the patron himself presents, and his clerk is instituted, the Crown, by presenting another, may turn out the patron's clerk, or, after induction, may remove him by *quare impedit* (*n*); though if neither of these courses is adopted, and the patron's clerk dies incumbent, or is canonically deprived, the right of presentation is lost to the Crown (*o*).

Again, if a bill of exchange be seized under an extent before it has become due, the neglect of the officer of the Crown to give notice of dishonour, or to make presentment of the bill, will not discharge the drawer or indorsers; and this likewise results from the general principle above stated, that laches cannot be imputed to the Crown (*p*).

To high constitutional questions involving the prerogative, the maxim under our notice must doubtless be applied with much caution, for it would be dangerous and absurd to hold that a power which has once been exercised by the Crown—no matter at how remote soever an epoch—has necessarily remained inherent in it, and we

(*n*) 6 Rep. 50.

(*o*) 2 Black. Com. 450-452.; cited arg. *Storie* v. *Bishop of Winchester*, 9 C. B. 90, and 17 C. B. 653; *Baskerville's case*, 7 Rep. 111; Bac. Abr., 7th ed., "*Prerogative*" (E. 6); Hobart, 166; Finch's Law, 90.

(*p*) West on Extents, 28-30.

might vainly attempt to argue in support of so general a proposition. During the discussion in the House of Lords on life peerages, it was said that although the rights and powers of the Crown do not suffer from lapse of time, nevertheless one of the main principles on which our constitution rests is the long-continued usage of Parliament, and that to go back for several centuries in order to select a few instances in which the Crown has performed a particular act by virtue of its prerogative before the Constitution was formed or brought into a regular shape—to rely on such precedents, and to make them the foundation of a change in the composition of either House of Parliament, would be grossly to violate the principles and spirit of our Constitution (*q*). But although the most zealous advocate of the prerogative could not by precedents, gathered only from remote ages, shape successfully a sound Constitutional theory touching the powers and privileges of the Crown, it would be far from correct to affirm that its rights can fall into desuetude, or, by mere non-user, become abrogated. *Ex. gr.* Assuming that the right of veto upon a bill which has passed through Parliament has not been exercised for a century and a half, none could deny that such a right is still vested in the Crown (*r*).

(*q*) Hansard, vol. 140, p. 263 *et seq.*

(*r*) *Id.* p. 284.

QUANDO JUS DOMINI REGIS ET SUBDITI CONCURRUNT JUS REGIS PRÆFERRI DEBET. (9 *Rep.* 129.) *Where the title of the king and the title of a subject concur, the king's title shall be preferred* (*s*).

In the above case, *detur digniori* is the rule (*t*), and accordingly, if a chattel be devised to the king and another jointly, the king shall have it, there being this peculiar quality inherent in the prerogative that the king cannot have a joint property with any person in one entire chattel, or such a property as is not capable of division or separation; where the titles of the king and of a subject concur, the king shall have the whole. The peculiarity of this doctrine of our law, so favourable to the prerogative, may justify the giving a few illustrations of its operation:—1st. As regards chattels real: if the king either by grant or contract become joint tenant of such a chattel with another person, he will *ipso facto* become entitled to the whole in severalty. 2ndly. As regards chattels personal: if a horse be given to the king and a private person, the king shall have the sole property therein; if a bond be made to the king and a subject, the king shall have the whole penalty; if two persons possess a horse jointly, or have a joint debt owing them on bond, and one of them assigns his part to the king, the king shall have the horse or debt; for our law holds it not consistent with the dignity of the Crown to be partner with a subject, and where the king's title and that of a subject concur or are in conflict, the king's title is to be preferred (*u*). By applying this maxim to one possible state of facts, a rather curious

Where property in chattel, &c., vests in Crown and subject jointly.

(*s*) Co. Litt. 30 b.
(*t*) 2 Ventr. 268.
(*u*) 2 Com. by Broom & Hadley: 603, 604.

result is arrived at: if there be two joint tenants of a chattel, one of whom is guilty of felony, this felonious act works a forfeiture of one undivided moiety of the chattel in question to the Crown, and the Crown being thus in joint possession with a subject, takes the whole (*x*).

Execution at suit of Crown.

Further, the king's debts shall, in suing out execution, be preferred to that of every other creditor who had not obtained judgment before the king commenced his suit (*y*).

The king's judgment formerly affected all land which the king's debtor had at or after the time of contracting his debt (*z*); but now no debts or liabilities to the Crown incurred after November 1, 1865, affect land as to a *bonâ fide* purchaser for valuable consideration, or a mortgagee, whether with or without notice, unless registration of the writ or process of execution has, previously to the conveyance or mortgage, been executed (*a*).

Again, the rule of law is, that, where the sheriff seizes under a fi. fa., and, after seizure, but before sale (*b*), under such writ, a writ of extent is sued out and delivered to the sheriff, the Crown is entitled to the priority, and the sheriff must sell under the extent, and satisfy the Crown's debt, before he sells under the fi. fa. Nor does it make any difference whether the extent is in chief or in aid, *i.e.*, whether it is directly against the king's debtor, or brought to recover a debt due from some third party to such debtor; it having been the practice in very ancient times, that, if the king's debtor was unable to satisfy the king's debt out of his own chattels, the king

(*x*) See *Hales* v. *Petit*, Plowd. 253.

(*y*) Stat. 33 Hen. 8, c. 39, s. 74; see also 32 & 33 Vict. c. 46.

(*z*) 13 Eliz. c. 4.

(*a*) 28 & 29 Vict. c. 104, s. 4. See further as to former legislation on the above subject, Williams, Real Prop., 8th ed. 85-87.

(*b*) See *R.* v. *Sloper*, 6 Price, 114.

would betake himself to any third person who was indebted to the king's debtor (*c*), and would recover of such third person what he owed to the king's debtor, in order to get payment of the debt due from the latter to the Crown (*d*). And the same principle was held to apply where goods in the hands of the sheriff, under a fi. fa., and before sale, were seized by the officers of the customs under a warrant to levy a penalty incurred by the defendant for an offence against the revenue laws; the Court observing, that there was no sound distinction between a warrant issued to recover a debt to the Crown and an extent (*e*).

In *Reg.* v. *Edwards* (*f*), decided under the former bankrupt law, the facts were as under:—An official assignee having been appointed to a bankrupt's estate, later on the day of his appointment an extent issued at the suit of the Crown against the bankrupt for a Crown debt, and the question was which should have priority, the Court decided that where the title of the Crown and of the subject accrue on the same day, the king's title shall be preferred. The seizure under the extent, therefore, was upheld, and the title of the official assignee was ignored. The decision in *Reg.* v. *Edwards* may however be supported on a principle other than that just stated, viz.: that "whether between the Crown and a subject, or between subject and subject, judicial proceedings are to be considered as having taken place at the earliest period of the day on which they are done" (*g*).

(*c*) See *R.* v. *Larking*, 8 Price, 683.

(*d*) *Giles* v. *Grover*, 9 Bing. 128, 191, recognising *R.* v. *Cotton*, Parker, R. 112. See *A. G.* v. *Trueman*, 11 M. & W. 694; *A. G.* v. *Walmsley*, 12 M. & W. 179; *Reg.* v. *Austin*, 10 M. & W. 693.

(*e*) *Grove* v. *Aldridge*, 9 Bing. 428.

(*f*) 9 Exch. 32, 628.

(*g*) *Wright* v. *Mills*, 4 H. & N. 491; Judgm. 9 Exch. 631. *Evans*

Sale in market overt.

In connection with the maxim before us we may add, that the king is not bound by a sale in market overt, but may seize to his own use a chattel which has passed into the hands of a *bonâ fide* purchaser for value (*h*).

ROY N'EST LIE PER ASCUN STATUTE, SI IL NE SOIT EXPRESSEMENT NOSME. (*Jenk. Cent.* 307.)—*The king is not bound by any statute, if he be not expressly named to be so bound* (*i*).

Statement of rule.

The king is not bound by any statute, if he be not expressly named therein, unless there be equivalent words, or unless the prerogative be included by necessary implication; for it is inferred, *primâ facie*, that the law made by the Crown, with the assent of the Lords and Commons, is made for subjects, and not for the Crown (*k*). Thus in considering the question—What is the occupation of real property which is liable to be rated under the stat. 43 Eliz. c. 2, s. 1, it has been observed (*l*) that "the only occupier of property exempt from the operation of the Act is the king, because he is not named in the statute, and the direct and immediate servants of the Crown, whose occupation is the occupation of the Crown itself, also come within the exemption..... No exemption is

v. *Jones*, 3 H. & C. 423; but see *Clarke* v. *Bradlaugh*, 7 Q. B. D. 157; 50 L. J. Q. B. 342, 678.

(*h*) 2 Inst. 713.

(*i*) Jenk. Cent. 307; Wing. Max. 1.

(*k*) *Per* Alderson, B., *A. G.* v. *Donaldson*, 10 M. & W. 123, 124, citing *Willion* v. *Berkley*, Plowd. 236; *De Bode* v. *Reg.* 13 Q. B., 373, 5, 8. *Per* Lord Cottenham, C., *Ledsam* v. *Russell*, 1 H. L. Cas. 697; *Doe* v. *Archbishop of York*, 14 Q. B. 81, 95.

(*l*) *Per* Lord Westbury, C., *Mersey Docks* v. *Cameron*, *Jones* v. *Mersey Docks*, 11 H. L. Cas. 501, 503; *Reg.* v. *McCann*, L. R. 3 Q. B. 141, 145, 146.

thereby given to charity or to public purposes beyond that which is strictly involved in the position that the Crown is not bound by the Act." So the prerogative of the Crown to remove into the Queen's Bench Division of the High Court of Justice as inheriting the functions of the Court of Exchequer, a cause which touches its revenue, is unaffected by the County Court Acts (*m*). Nor does the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18) affect the interests of the Crown (*n*). Neither is the prerogative of the Crown to plead and demur without leave to a Petition of Right under 23 & 24 Vict. c. 34, affected by that statute (*o*).

Rule, how restricted.

The rule above stated seems, however, to apply only where the property or peculiar privileges of the Crown are affected; and this distinction is laid down, that where the king has any prerogative, estate, right, title, or interest, he shall not be barred of them by the general words of an Act, if he be not named therein (*p*). Yet, if a statute be intended to give a remedy against a wrong, the king, though not named, shall be bound by it (*q*): and the king is impliedly bound by statutes passed for the public good, the preservation of public rights, and the suppression of public wrongs, the relief and maintenance of the poor, the general advancement of learning, religion, and justice, or for the prevention of fraud (*r*);

(*m*) *Mountjoy* v. *Wood*, 1 H. & N. 58.

(*n*) *Re Cuckfield Burial Board*, 19 Beav. 153. See also *Reg.* v. *Beadle*, 7 E. & B. 492.

(*o*) *Tobin* v. *Reg.*, 14 C. B. N. S. 505; S. C. 16 *Id.* 310; *Feather* v. *Reg.*, 6 B. & S. 293.

(*p*) *Magdalen College case*, 11 Rep. 74 *b*, cited Bac. Abr. "*Prerogative*" (E. 5): Com. Dig. "*Parliament*" R. 8. See the qualifications of this proposition laid down in Dwarr. Stats., 2nd ed. 523 *et seq.*

(*q*) *Willion* v. *Berkley*, Plowd. 239, 244, See the authorities cited arg. *R.* v. *Wright*, 1 A. & E. 436 *et seq.*

(*r*) *Magdalen College case*, 11 Rep. 70 *b*, 72; Chit. Pre. Crown, 382.

and, though not named, he is bound by the general words of statutes which tend to perform the will of a founder or donor (*s*); and the king may likewise take the benefit of any particular Act, though he be not especially named therein (*t*).

But, as above stated, Acts of Parliament which would devest the king of any of his prerogatives do not, in general, extend to or bind the king, unless there be express words to that effect: therefore, the Statutes of Limitation and Set-off, are irrelevant in the case of the king, nor does the Statute of Frauds relate to him (*u*), nor does a local Act imposing tolls and duties affect the Crown (*x*). Also, by mere indifferent statutes, directing that certain matters shall be performed as therein pointed out, the king is not, in many instances, prevented from adopting a different course in pursuance of his prerogative (*y*).

In fine, the modern doctrine bearing on the subject before us, is said (*z*) to be that by general words in an Act of Parliament, the king may be precluded of such inferior claims as might belong indifferently to him or to a subject (as the title to an advowson or a landed estate), but

(*s*) Vin. Abr., *Statutes*" (E. 10), pl. 11; 5 Rep. 146; *Willion* v. *Berkley*, Plowd. 236.

(*t*) Judgm. *R.* v. *Wright*, 1 A. & E. 447. In *A. G.* v. *Radloff*, 10 Exch. 94, Pollock, C. B., observes, that "the Crown is not bound with reference to matters affecting its property or person, but is bound with respect to the practice in the administration of justice." In *Clarke* v. *Bradlaugh*, L. R. 8 App. Cas., Ld. Selborne expressed an opinion that express words are not necessary to make a penalty originally appertaining to the Crown recoverable by popular action.

(*u*) Chit. Pre. Crown, 366, 383; *R.* v. *Copland*, Hughes, 204, 230; Vin. Abr. "*Statutes*" (E. 10.)

(*x*) *Mayor, &c., of Weymouth* v. *Nugent*, 6 B & S. 22, 35.

(*y*) Chit. Pre. Crown, 383, 384.

(*z*) Dwarr. Stats., 2nd ed., 523-4. See also *Mayor, &c., of London* v. *A. G.*, 1 H. L. Cas. 440. As to the mode of construing grants from the Crown, see the maxim "*Verba chartarum fortius accipiuntur contra proferentem*," *post*, Chap. VIII.

not stripped of any part of his ancient prerogative, nor of those rights which are incommunicable and appropriate to him as essential to his regal capacity.

NEMO PATRIAM IN QUA NATUS EST EXUERE NEC LIGEANTIÆ DEBITUM EJURARE POSSIT. (*Co. Lit.* 129 *a.*)
A man cannot abjure his native country nor the allegiance which he owes to his sovereign.

"The law of England, and of almost all civilised countries, ascribes to each individual at his birth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status;* another by virtue of which he has ascribed to him the character of a citizen of some particular country, and, as such, is possessed of certain municipal rights and subject to certain obligations, which latter character is the civil *status* or condition of the individual, and may be quite different from his political *status.* The political *status* may depend on different laws in different countries, whereas the civil *status* is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil *status;* for it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy, must depend" (*a*).

(*a*) *Per* Lord Westbury, *Udny* v. *Udny*, L. R. 1 Sc. App. 457. See *Moorhouse* v. *Lord*, 10 H. L. Cas. 272; *Shaw* v. *Gould*, L. R. 3 H. L. 55.

Allegiance is defined, by Sir *E. Coke*, to be "a true and faithful obedience of the subject due to his sovereign" (*b*). And in the words of the late Mr. Justice *Story*, "Allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth is that which arises from being born within the dominions and under the protection of a particular sovereign. Two things usually occur to create citizenship: first, birth, locally within the dominions of the sovereign; secondly, birth, within the protection and obedience, or, in other words, within the legiance of the sovereign. That is, the party must be born within a place where the sovereign is, at the time, in full possession and exercise of his power, and the party must also, at his birth, derive protection from, and consequently owe obedience or allegiance to, the sovereign as such *de facto*. There are some exceptions, which are founded upon peculiar reasons, and which indeed illustrate and confirm the general doctrine" (*c*).

Allegiance is the tie which binds the subject to the Crown, in return for that protection which the Crown affords to the subject, and is distinguished by our customary law into two sorts or species, the one natural, the other local. Natural allegiance is such as is due from all men born within the dominions of the Crown, immediately upon their birth; and to this species of alle-

(*b*) *Calvin's case*, 7 Rep. 5; S. C. Broom's Const. L. 4, and Note thereto, *Id.* 26 *et seq.*, where the cases which concern allegiance at common law, and the operation of the statutes hitherto passed affecting it, are considered. And see the stat. 21 & 22 Vict. c. 93 (and as to Ireland the stat. 31 & 32 Vict. c. 20), which enables a person to establish, under the circumstances specified in and as provided by the Act, his right to be deemed a natural-born subject.

(*c*) 3 Peters (U. S.) R. 155.

giance it is that the above maxim is applicable (*d*). It cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature. The natural-born subject of one prince cannot, by any act of his own, not even by swearing allegiance to another, put off or discharge his natural allegiance to the former (*e*), *originе propriâ neminem posse voluntate suâ eximi manifestum est* (*f*); for this natural allegiance was intrinsic and primitive, and antecedent to the other, and cannot be devested without the concurrent act of that prince to whom it was first due (*g*). Hence, although a British subject may, in certain cases, forfeit his rights as such by adhering to a foreign power, he yet remains at common law always liable to his duties; and if, in the course of such employment, he violates the laws of his native country, he will be exposed to punishment when he comes within reach of her tribunals.

The tie of natural allegiance may, however, be severed with the concurrence of the legislature—for instance, upon the recognition of the United States of America, as free, sovereign, and independent states, it was decided that the natural-born subjects of the English Crown adhering to the United States ceased to be subjects of the Crown of England, and became aliens and incapable of inheriting lands in England (*h*).

We shall merely add, that local allegiance is such as is

(*d*) Foster, Cr. Law, 184.

(*e*) *Vide per* Jervis, C. J., *Barrick* v. *Buba*, 16 C. B. 493; citing *Albretcht* v. *Sussman*, 2 Ves. & B. 323.

(*f*) Cod. 10. 38. 4.

(*g*) See Foster, Cr. Law; 184; Hale, P. C. 68; judgm. *Wilson* v. *Marryat*, 8 T. R. 45; S. C. affirmed in error, 1 B. & P. 430.

(*h*) *Doe* d. *Thomas* v. *Acklam*, 2 B. & C. 779; *Doe* d. *Stansbury* v. *Arkwright*, 5 C. & P. 575. The 33 Vict. c. 14 removes the disabilities of foreigners in respect of property.

due from an alien or stranger born whilst he continues within the dominion and protection of the Crown; but it is merely of a temporary nature, and ceases the instant such stranger transfers himself from this kingdom to another. For, as the prince affords his protection to an alien only during his residence in this realm, the allegiance of an alien is confined, in point of time, to the duration of such his residence, and, in point of locality, to the dominions of the British Empire (*i*); the rule being, that *protectio trahit subjectionem et subjectio protectionem* (*k*)—a maxim which extends not only to those who are born within the king's dominions, but also to foreigners who live within them, even though their sovereign is at war with this country, for they equally enjoy the protection of the Crown.

Naturalization Act, 1870.

The Naturalization Act, 1870 (*l*), provides means and prescribes forms, by complying with which persons who may have been born British subjects may declare themselves aliens, and cease to be British subjects, and also enacts that any one who voluntarily becomes naturalized in a foreign country shall cease to be a British subject, while five years' residence in the United Kingdom or service under the Crown may, under certain conditions, make an alien a subject of the Queen.

(*i*) Chit. Pre. Crown, 16. See *Wolff* v. *Oxholm*, 6 M. & S. 92; *R.* v. *Johnson*, 6 East, 583.

(*k*) *Calvin's case*, 7 Rep. 5; *Craw* v. *Ramsay*, Vaughan, R. 279; Co. Litt. 65 a.

(*l*) 33 Vict. c. 14.

CHAPTER III.

§ I.—THE JUDICIAL OFFICE.

THE maxims contained in this section exhibit briefly the more important of those duties which attach to persons filling judicial offices, and discharging the functions which appertain thereto. It would have been inconsistent with the plan and limits of this volume to treat of such duties at greater length, and would not, it is believed, have materially added to its utility.

BONI JUDICIS EST AMPLIARE JURISDICTIONEM. (*Chanc. Prec.* 329.) *It is the duty of a judge, when requisite, to amplify the limits of his jurisdiction.*

This maxim, as above worded and literally rendered, might lead the student into error. Lord *Mansfield* once suggested that for the word *jurisdictionem, justitiam* should be substituted (*a*), and in reference to it Sir R. *Atkyns* (*b*) had before him remarked:—"It is indeed commonly said *boni judicis est ampliare jurisdictionem.* But I take that to be better advice which was given by

Maxim how to be understood.

(*a*) "The true text is, *boni judicis est ampliare justitiam*, not *jurisdictionem*, as it has been often cited;" *per* Lord Mansfield, C.J., 1 Burr. 304.

(*b*) Arg. *R.* v. *Williams*, 13 St. Tr. 1430; *Et vide per* Cresswell, J., *Dart* v. *Dart*, 32 L. J. P. M. & A. 125.

the Lord Chancellor *Bacon* to Mr. Justice *Hutton* upon the swearing him one of the Judges of the Court of Common Pleas,—that he should take care to contain the jurisdiction of the Court within the ancient mere-stones without removing the mark" (*c*).

The true maxim of English law accordingly is "to amplify its remedies, and, *without usurping jurisdiction*, to apply its rules, to the advancement of substantial justice" (*d*); the principle upon which our Courts of law act is, to enforce the performance of contracts not injurious to society, and to administer justice to a party who can make his claim to redress appear, by enlarging the legal remedy, if necessary, in order to do justice; for the common law of the land is the birthright of the subject, and *bonus judex secundum æquum et bonum judicat, et æquitatem stricto juri præfert* (*e*). "I commend the judge," observes Lord *Hobart*, "who seems fine and ingenious, so it tend to right and equity; and I condemn them who, either out of pleasure to show a subtle wit, will destroy, or out of incuriousness or negligence will not labour to support, the act of the party by the art or act of the law" (*f*).

(*c*) Bacon's Works, by Montague, vol. vii., p. 271. As on the one hand a judge cannot extend his jurisdiction, so, on the other hand, "the superior courts at Westminster, and the judges, are not at liberty to decline a jurisdiction imposed upon them by Act of Parliament." Judgm. *Furber* v. *Sturmey*, 3 H. & N. 531.

(*d*) *Per* Lord Abinger, C. B., *Russell* v. *Smyth*, 9 M. & W. 818; cited arg. *Kelsall* v. *Marshall*, 1 C. B., N. S. 255; see also *per* Lord Mansfield, C.J., 4 Burr. 2239.

(*e*) *Per* Buller, J., 4 T. R. 344. See *Ashmole* v. *Wainwright*, 2 Q. B. 837.

(*f*) Hobart, 125. "I do exceedingly commend the judges that are curious and almost subtle * * to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury which by rigid rules might be wrought out of the act." *Per* Lord Hobart, *Id.* 227. Cited *per Turner*, V. C., *Squire* v. *Ford*, 9 Hare, 57.

Money had and received.

The old form of action for money had and received is peculiarly illustrative of the principle above set forth; the foundation of this action being that the plaintiff is in conscience entitled to the money sought to be recovered; and it has been observed, that this kind of equitable action to recover back money which ought not in justice to be kept is very beneficial, and, therefore, much encouraged. It lies only for money which, *ex æquo et bono*, the defendant ought to refund (*g*). "The ground," observed *Tindal*, C. J., in *Edwards* v. *Bates* (*h*), "upon which an action of this description is maintainable, is that the money received by the defendants is money, which, *ex æquo et bono*, ought to be paid over to the plaintiff. Such is the principle upon which the action has rested from the time of Lord *Mansfield*. When money has been received without consideration, or upon a consideration that has failed, the recipient holds it *ex æquo et bono* for the plaintiff" (*i*).

Power to amend.

The power of directing an amendment of the record, and dispensing with forms as to which the judges under modern Judicature Acts enjoy the widest discretion, may likewise be instanced as one which is confided to them by the legislature, in order that it may be applied "to the advancement of substantial justice."

Jurisdiction of judge at chambers.

The general maxim under consideration is of course

(*g*) *Per* Lord Mansfield, C.J., *Moses* v. *Macfarlane*, 2 Burr. 1012; *Litt* v. *Martindale*, 18 C. B., 314; *per* Pollock, C.B., *Aikin* v. *Short*, 1 H. & N. 214; *Holt* v. *Ely*, 1 E. & B. 795; *Somes* v. *British Empire Shipping Co.*, 8 H. L. Cas. 338.

(*h*) 8 Scott, N. R., 414; S. C. 7 M. & Gr. 590.

(*i*) See *Martin* v. *Andrews*, 7 E. & B. 1; *Garton* v. *Bristol and Exeter R. C.*, 1 B. & S. 112; *Baxendale* v. *Great Western R. C.*, 14 C. B. N. S. 1; S. C. affirmed, 16 C. B. N. S. 137; *Roberts* v. *Aulton*, 2 H. & N. 432; *Barnes* v. *Braithwaite*, *Id.* 569.

applicable with reference to the jurisdiction of a judge at chambers, and to the important and arduous duties which are there discharged by him.

The proceeding by application to a judge at chambers has indeed been devised and adopted by the Courts, under the sanction of the legislature, for the purpose of preventing the delay, expense, and inconvenience which must ensue if applications to the Courts were in all cases, and under all circumstances, indispensably necessary. A judge at chambers is usually described as acting under the delegated authority of the Court, and his jurisdiction is different from that of a judge sitting at Nisi Prius; in the former case the judge has a wider field for the exercise of his discretion, which the appellate Courts are most reluctant to review, and with which they will only interfere where he is shown to have been clearly wrong (*k*).

In a modern case, where it was held that a judge at chambers has jurisdiction to fix the amount of costs to be paid as the condition of making an order, the maxim to which we have here directed attention, was expressly applied. "As to the power of the judge to tax costs," remarked *Vaughan*, J., "if he is willing to do it, and can save expense, it is clear that what the officer of the Court may do, the judge may do, and *boni judicis est ampliare jurisdictionem*, i. e. *justitiam*" (*l*).

Qualification of maxim.

Although necessarily many things, especially in the domain of procedure, are left to the discretion of our judges, the maxim is also observed in our jurisprudence, *optima est lex quæ minimum relinquit arbitrio judicis*,

(*k*) *Inman* v. *Jenkins*, L. R. 5 C. P. 738, 39 L. J. C. P. 258. *Per* Lord Ellenborough, C.J., *Alner* v. *George*, 1 Camp. 393.

(*l*) *Collins* v. *Aron*, 4 Bing. N. C. 233, 235. See *Clement* v. *Weaver*, 4 Scott, N. R., 229, and cases cited *Id.* 231, n. (44).

optimus judex qui minimum sibi (*m*)—that system of law is best, which confides as little as possble to the discretion (*n*) of the judge—that judge the best, who relies as little as possible on his own opinion.

And although where discretion is left to a judge, he is to a great extent unfettered in its exercise, Coke's definition still holds good, *discretio est discernere per legem quid sit justum* (*n*), and "discretion, when applied to a Court of justice, means *sound* discretion *guided by law*. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular" (*o*).

Therefore, if in the presumed exercise of discretion, a judge has decided in a manner absolutely unreasonable and opposed to justice, his error will be corrected on appeal. "Whatever the law may have been before the Judicature Acts," says Jessel, M. R. (*p*), "the exercise of discretion is now the subject of appeal. It has been very truly said that a very strong case must be made out before the exercise of discretion can be overruled. The Court of Appeal must be satisfied that it has been wrongly exercised." Although there must be a plain and clear case to justify the Court of Appeal in interfering with the discretion of the Court below, the former Court will review the discretion if it be exercised in consequence of

(*m*) Bac. Aphorisms, 46. See *per* Wilmot, C.J., *Collins* v. *Blantern*, 2 Wilson, 341; *per* Buller, J., *Master* v. *Miller*, 4 T. R. 344, affirmed in error, 2 H. Bla. 141; Co. Litt. 24 b.; *per* Tindal, C.J., 6 Scott, N. R. 180; 5 H. L. Cas. 785, 958.

(*n*) 4 Inst. 41, cited *per* Tindal, C.J., 6 Q. B., 700. See *Rooke's case*, 5 Rep. 99-100; 1 W. Bla. 152; 1 Burr. 570; 3 Bulstr. 128.

(*o*) *Per* Lord Mansfield, C.J., *R.* v. *Wilkes*, 2 Burr. 25, 39.

(*p*) *Reg.* v. *Mayor of Maidenhead*, 9 Q. B. D. 503, 51 L. J. Q. B. 448.

an erroneous view of the law (*q*), or an obvious mistake of fact, or where it is impossible to say that there has been a reasonable exercise of discretion (*r*).

Further, be it remembered, that there is no court in England which is entrusted with the power of administering justice without restraint. That restraint has been imposed from the earliest times. And, although instances are constantly occurring where the courts might profitably be employed in doing simple justice between the parties, unfettered by precedent, or by technical rules, the law has wisely considered it inconvenient to confer such power upon those whose duty it is to preside in courts of justice (*s*). The only court in this country which is not so fettered is the supreme court of the legislature (*s*); for "certain it is," says Lord *Coke*, "that *Curia Parliamenti suis propriis legibus subsistit*" (*t*).

DE FIDE ET OFFICIO JUDICIS NON RECIPITUR QUÆSTIO, SED DE SCIENTIA SIVE SIT ERROR JURIS SIVE FACTI. (*Bac. Max., reg.* 17.)—*The bona fides and honesty of purpose of a judge cannot be questioned, but his decision may be impugned for error either of law or of fact.*

General rule. No action lies

The law, says Lord *Bacon*, has so much respect for the certainty of judgments, and the credit and authority of

(*q*) *Hunt* v. *Chambers*, 20 Ch. D. 369; 51 L. J. Ch. 683.

(*r*) *Wigney* v. *Wigney*, 7 P. D. 182, 51 L. J. P. 62. *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, 50 L. J. Q. B. 49; *Ormerod* v. *Todmorden Mill Co.*, 8 Q. B. D. 664, 51 L. J. Q. B. 348; *Berdan* v. *Greenwood*, 20 Ch. D. 767.

(*s*) *Per* Maule, J., *Freeman* v. *Tranah*, 12 C. B. 413-414.

(*t*) 4 Inst. 50. Some remarks as

judges, that it will not permit any error to be assigned which impeaches them in their trust and office, and in wilful abuse of the same (*u*). It is, moreover, a general rule of great antiquity, that no action will lie against a judge of record for any act done by him in the exercise of his judicial functions, provided such act, though done mistakenly, were within the scope of his jurisdiction (*x*). "The rule that a judicial officer cannot be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction, and also the rule, that a matter of fact so adjudicated by him cannot be put in issue in an action against him, have been uniformly maintained" (*y*). against a judge.

"The doctrine," says Mr. Chancellor *Kent* (*z*), "which holds a judge exempt from a civil suit or indictment for any act done or omitted to be done by him sitting as judge, has a deep root in the common law. It is to be found in the earliest judicial records, and it has been steadily maintained by an undisturbed current of decision in the English courts, amidst every change of policy and through every revolution of their government. A

to the interpretation of statutes which might, perhaps, have been relevant under this maxim have been postponed until Chap. VIII., which deals generally with that subject.

(*u*) Bac. Max., reg. 17; *Bushell's case*, Vaugh. R. 138-139; 12 Rep. 25 *per* Holt, C. J. *Groenvelt* v. *Burwell*, 1 Lord Raym. 468; S. C., 1 Salk. 397; 12 Rep. 24, 25.

(*x*) *Smith* v. *Boucher*, Cas. Temp. Hardw. 69; *Calder* v. *Halket*, 3 Moo. P. C. C. 28, with which compare *Gahan* v., *Lafitte*, 8 Moo. P. C. C 382; *Scott* v. *Stansfeld*, L. R. 3 C. P. 220; *Taaffe* v. *Downes*, *Id.* 36 n. (a); *Houlden* v. *Smith*, 14 Q. B. 841; Judgm. *Mostyn* v. *Fabrigas*, Cowp. 161; *Phillips* v. *Eyre*, L. R. 4 Q. B. 225, 229; *Pease* v. *Chaytor*, 1 B. & S. 658; *Hamilton* v. *Anderson*, Macq. Sc. App. Cas. 363.

(*y*) Judgm. *Kemp* v. *Neville*, 10 C. B. N. S. 549; *per* Erle, C.J., *Wildes* v. *Russell*, L. R. 1 C. P. 730.

(*z*) *Yates* v. *Lansing*, 5 Johnson (U.S.), R. 291; S. C. (in error), 9 *Id.* 396.

short view of the cases will teach us to admire the wisdom of our forefathers, and to revere a principle on which rests the independence of the administration of justice."

This freedom from action and question at the suit of an individual, it has likewise been observed, is given by our law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that, being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be; and it is not to be supposed beforehand, that those who are selected for the administration of justice will make an ill use of the authority vested in them. Even inferior justices cannot be called in question for an error in judgment, so long as they act within the bounds of their jurisdiction. In the imperfection of human nature, it is better that an individual should occasionally suffer a wrong, than that the general course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it. Corruption is quite another matter; so also are neglect of duty and misconduct. For these there is, and always will be, some due course of punishment by public prosecution (*a*).

An action, then, does not lie against a judge, civil (*b*)

(*a*) Judgm., *Garnett* v. *Ferrand*, 6 B. & C. 625, 626; *Thomas* v. *Churton*, 2 B. & S. 475; Vaugh. R. 383. See *R.* v. *Johnson*, 6 East, 583, S. C., 7 East, 65, in which case one of the judges of the Court of Common Pleas in Ireland was convicted of a libel. The judges are not liable to removal, except upon addresses of both Houses of Parliament; see Stats. 13 Will. 3, c. 2, and 1 Geo. 3, c. 23.

(*b*) *Dicas* v. *Lord Brougham*, 6 C. & P. 249; *Kemp* v. *Neville*, 10 C. B. N. S. 523 (where the action was brought against the Vice-Chancellor of the University of Cambridge); *Tinsley* v. *Nassau*, Mo. &

or ecclesiastical (*c*), acting judicially in a matter within the scope of his jurisdiction (*d*). Nor can a suit be maintained against persons so acting with a more limited authority, as the steward of a court baron (*e*), or commissioners of a court of request; and, as already intimated, magistrates, acting in discharge of their duty, and within the bounds of their jurisdiction, are irresponsible even where the circumstances under which they are called upon to act, would not have supported the complaint, provided that such circumstances were not disclosed to them at the time of their adjudication (*f*).

"If," as judicially remarked, "a magistrate commit a party charged before him in a case where he has no jurisdiction, he is liable for trespass (*g*). But if the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation" (*h*).

Mal. 52; *Johnstone* v. *Sutton*, 1 T. R. 513; *per* Holt, C.J., 1 Lord Raym. 468; *Garnett* v. *Ferrand*, 6 B. & C. 611.

(*c*) *Ackerley* v. *Parkinson*, 3 M. & S. 411, 425; *Beaurain* v. *Scott*, 3 Camp. 388.

(*d*) *Ib.* See *Wingate* v. *Waite*, 6 M. & W. 739, 746; *Hamilton* v. *Anderson*, 3 Macq. Sc. App. Cas. 363.

(*e*) *Holroyd* v. *Breare*, 2 B. & Ald. 473. Judgm. *Bradley* v. *Carr*, 3 Scott, N. R. 521, 528; *Carratt* v. *Morley*, 1 Q. B. 18; *Andrews* v. *Marris*, *Id.* 3, and cases there cited. *Morris* v. *Parkinson*, 1 Cr. M. & R. 163.

(*f*) *Pike* v. *Carter*, 3 Bing. 78; *Lowther* v. *Earl of Radnor*, 8 East 113; *Brown* v. *Copley*, 8 Scott, N. R. 350; *Pitcher* v. *King*, 9 A. & E. 288; 2 Roll. Abr. 552, pl. 10.

(*g*) See, for instance, *Newbould* v. *Coltman*, 6 Exch. 189; *Pedley* v. *Davis*, 10 C. B. N. S. 492.

(*h*) *Per* Tindal, C.J., *Cave* v. *Mountain*, 1 M. & Gr. 257, 261, recognised *Reg.* v. *Bolton*, 1 Q. B. 66. 75; *Reg.* v. *Grant*, 14 Q. B. 43. See *Reg.* v. *Inhabs. of Hickling*, 7 Q. B. 880, following *Brittain* v. *Kinnaird*, 1 B. & B. 432; *Ayrton* v. *Abbott*, 14 Q. B. 1, 23.

And where the authority is given to justices by statute, and they appear to have acted within the jurisdiction so given, and to have done all that the particular statute requires them to do, in order to originate their jurisdiction, their conviction, drawn up in due form, and remaining in force, is a protection and conclusive evideuce for them in any action which may be brought against them for the act so done (*i*). That is to say, "in an action brought against a magistrate, a subsisting conviction—good upon the face of it, in a case to which his jurisdiction extends, being produced at the trial, is a bar to the action, provided that the conviction was not made maliciously and without reasonable and probable cause, and provided also that the execution has been regular, although the magistrate may have formed an erroneous judgment upon the facts; for that is properly the subject of appeal" (*k*). Ample protection, it will be remembered, is, by a recent enactment, the provisions of which cannot here be set out, extended to justices of the peace (*l*).

Distinction to be observed in applying rule.

Having thus briefly stated the broad rule applicable to the right of action against persons invested with judicial functions, we may remark that there is one very extensive class of cases which may, on a cursory observation, appear to fall within its operation, but which is, in fact, governed by a different, although not less

(*i*) *Per* Abbott, C.J., *Basten* v. *Carew*, 5 B. & C. 652, 653; S. C., 5 D. & R. 558; *Baylis* v. *Strickland*, 1 Scott, N. R., 540; *Fernley* v. *Worthington*, 1 Scott, N. R., 432. *Painter* v. *Liverpool Gas Co.*, 3 A. & E. 433; *Webb* v. *Bachelour*, Ventr. 273; *Tarry* v. *Newman*, 15 M. & W. 645; *Stamp* v. *Sweetland*, 8 Q. B. 13. See also *Hazeldine* v. *Grove*, 3 Q. B. 997, 1006.

(*k*) Paley, Conv. 4th ed. 388.

(*l*) 11 & 12 Vict. c. 44 (repealed in part Stat. Law Rev. Act, 1875), as to which see Paley Conv., 4th ed., 399 *et seq.*; *Sommerville* v. *Mirehouse*, 1 B. & S. 652; *Pease* v. *Chaytor*, *Id.* 658; *Pedley* v. *Davis*, 10 C. B. N. S. 492; *Gelen* v. *Hall*, 2 H. & N. 379.

important, principle. We refer to cases in which the performance of some public duty is imposed by law upon an individual who, by neglecting or refusing to perform it, causes an injury to some other party; here, as a general rule, the injury occasioned by the breach of duty, without proof of *mala fides*, lays the foundation for an action for recovery of damages (*m*). This principle, moreover, applies where persons required to perform ministerial acts are at the same time invested with the judicial character, and in accordance therewith, in the celebrated *Auchterarder case* (*n*), the members of the presbytery were held liable, collectively and individually, to make compensation in damages, for refusing to take the presentee to a church on trial, as they were bound to do, according to the law of Scotland. The legislature, observed Lord *Brougham*, in the case referred to, can, of course, do no wrong, and its branches are equally placed beyond all control of the law. So, "the Courts of justice, that is, the superior Courts, Courts of general jurisdiction, are not answerable, either as bodies or by their individual members, for acts done within the limits of their jurisdiction. Even inferior Courts, provided the law has clothed them with judicial functions, are not answerable for errors in judgment; and where they may not act as judges, but only have a discretion confided to them, an erroneous exercise of that discretion, however plain the miscarriage may be, and however injurious its consequences, they shall not answer for. This follows from the very nature of the

(*m*) See *Barry* v. *Arnaud*, 10 A. & E. 646; cited *Mayor of Lichfield* v. *Simpson*, 8 Q. B. 65. *Per* Lord Brougham, *M'Kenna* v. *Pape*, 1 H. L. Cas. 7; *Steel* v. *Shombery*, 4 B. & B. 620; *Scott* v. *Mayor of Manchester*, 2 H. & N. 204.

(*n*) *Ferguson* v. *Earl of Kinnoul*, 9 Cl. & Fin. 251.

thing. It is implied in the nature of judicial authority, and in the nature of discretion, where there is no such judicial authority. But where the law neither confers judicial power, nor any discretion at all, but requires certain things to be done, every body, whatever be its name, and whatever other functions of a judicial or of a discretionary nature it may have, is bound to obey; and with the exception of the legislature and its branches, every body is liable for the consequences of disobedience; that is, its members are liable, through whose failure or contumacy the disobedience has arisen, and the consequent injury to the parties interested in the duty being performed" (*o*).

Appeal.

But although the honesty and integrity of a judge acting in his judicial capacity cannot be questioned, as a rule his errors may be corrected by appellate tribunals. There are, however, some limitations to the right of appeal even in civil causes. For example, there can be no appeal from a judge, who has discretion as to costs, upon a question of costs, except by leave of the judge, whose decision it may be desired to question (*p*). Again, in the case of County Courts, there can be no appeal on a question of fact (*q*), except by leave of the judge who tried the action, nor without similar leave on a question of law, where the plaintiff's claim does not exceed £20 (*r*).

Moreover, there is an unwritten rule invariably followed by the Superior Courts that, except under very special circumstances, new trials should not be had where the subject matter in dispute does not exceed £20.

(*o*) *Per* Lord Brougham, 9 Cl. & Fin. 289, 290, whose judgment has throughout an especial reference to the subject of judicial liability. See *Gathercole* v. *Miall*, 15 M. & W. 319, 332, 333.

(*p*) Judicature Act, 1873, sect. 49.

(*q*) This rule frequently works great injustice.

(*r*) Heywood's C. C. Pr., 2nd ed., 199, 30 & 31 Vict. c. 142, s. 13; *Blowers* v. *Rackham*, 20 L. J. Q. B. 397.

When an award has been made in pursuance of a submission to arbitration, which is by rule of Court, or a submission which has been made, or has the effect of, a rule of Court under the statute 9 & 10 Will. 3, c. 15, or the Common Law Procedure Acts, the Court has power, upon motion, to set it aside, or to send it back for reconsideration. An award will only be set aside where the arbitrator has been subject to corrupt influence or bias, or has acted in an unjudicial manner, as, *e.g.*, by refusing to hear certain claims, or taking evidence in the absence of one of the parties, or where it can be shown from the award itself that it is not a settlement of the matters referred, as either not final or not disposing of all the matters referred, or where it exceeds the authority conferred upon the arbitrator by the reference (*s*). An award will not be set aside because the arbitrator may have made mistakes, in law or in fact, even to the extent of a wrong ruling as to the admission or exclusion of evidence. Awards.

When the submission is made out of Court, and does not fall within the statute of Will. 3, nor the Common Law Procedure Acts, an award can only be vitiated by the corruption or misbehaviour of the arbitrator. Such faults cannot be pleaded to an action upon the award, and therefore the only remedy of a person against whom an award has been made upon a submission made out of Court, or not falling within the Common Law Procedure Acts, is by action to set aside the award (*t*).

(*s*) Russell on Awards, chap. ix. (*t*) Russell on Awards.

QUI JUSSU JUDICIS ALIQUOD FECERIT NON VIDETUR DOLO MALO FECISSE, QUIA PARERE NECESSE EST. (10 *Rep.* 76.)—*Where a person does an act by command of one exercising judicial authority, the law will not suppose that he acted from any wrongful or improper motive, because it was his bounden duty to obey* (*u*).

General rule.

Where a Court has jurisdiction of the cause, and proceeds *inverso ordine*, or erroneously, then the party who sues, or the officer or minister of the Court who executes according to its tenor (*v*) the precept or process of the Court, will not be liable to an action (*x*). But when the Court has not jurisdiction of the cause, then the whole proceeding is *coram non judice* (*y*), and actions will lie against the above-mentioned parties without any regard to the precept or process; for in this case it is not necessary to obey one who is not judge of the cause, any more than it is to obey a mere stranger, for the rule is, *judicium a non suo judice datum nullius est momenti* (*z*).

(*u*) This maxim is derived from the Roman law, see D. 50, 17, 167, § 1.

(*v*) See *Munday* v. *Stubbs*, 10 C. B. 432.

(*x*) See *Prentice* v. *Harrison*, 4 Q. B. 852; *Brown* v. *Jones*, 15 M. & W. 191; Judgm. *Ex parte Story*, 8 Exch. 201. See *Cotes* v. *Michill*, 3 Lev. 20; *Moravia* v. *Sloper*, Willes, 30, 34.

(*y*) See *Tinniswood* v. *Pattison*, 3 C. B. 243; *Factum a judice quod d officium ejus non pertinet ratum non est:* D. 50, 17, 170.

(*z*) *Marshalsea case*, 10 Rep. 70; *Taylor* v. *Clemson*, 2 Q. B. 1014, 1015; S. C., 11 Cl. & F. 610; cited *Ostler* v. *Cooke*, 13 Q. B. 143, 162; *Morrell* v. *Martin*, 4 Scott, N. R. 313, 314; *Jones* v. *Chapman*, 14 M. & W. 124; *Baylis* v. *Strickland*, 1 Scott, N. R. 540; *Marshall* v. *Lamb*, 5 Q. B. 115; *Watson* v. *Bodell*, 14 M. & W. 57; *Thomas* v. *Hudson*, *Id.* 353; *Van Sandau* v. *Turner*, 6 Q. B. 773; *Lloyd* v. *Harrison*, 6 B. & S. 36. *Andrews* v. *Marris*, 1 Q. B. 3, 16, 17, recognised in *Carratt* v. *Morley*, *Id.* 29; and distinguished in *Dews* v. *Riley*, 11 C. B. 434, 444; *Levy* v. *Moylan*,

Accordingly, in *Gosset* v. *Howard* (*a*), it was held, that the warrant of the Speaker of the House of Commons, having issued in a matter over which the House had jurisdiction, was to be construed on the same principle as a mandate or writ issuing out of a superior court acting according to the course of common law, and that it afforded a valid defence to an action for assault and false imprisonment brought against the Serjeant-at-Arms, who acted in obedience to such warrant. Examples.

In the last-mentioned case it is observable that the matter in respect of which the warrant issued was admitted to be within the jurisdiction of the House, and it is peculiarly necessary to notice this, because, in the previous case of *Stockdale* v. *Hansard* (*b*), it was held to be no defence at law to an action for publishing a libel, that the defamatory matter was part of a document, which was, by order of the House of Commons, laid before the House, and thereupon became part of the proceedings of the House, and which was afterwards, by order of the House, printed and published by the defendant. The decision in this case resulted from the opinion entertained by the Court being adverse to the existence of the privilege under which the defendant sought to justify the alleged wrongful act, and, in consequence of this decision, the stat. 3 & 4 Vict. c. 9, was passed, which *Stockdale* v. *Hansard.*

10 C. B. 189. As to the liability of the party at whose suit execution issued, or of his attorney, see *Carratt* v. *Morley*, *supra*; *Coomer* v. *Latham*, 16 M. & W. 713; *Ewart* v. *Jones*, 14 M. & W. 774; *Green* v. *Elgie*, 5 Q. B. 99; *Kinning* v. *Buchanan*, 8 C. B. 271; *Abley* v. *Dale*, 11 C. B. 378, 389; *post*, p. 124, n. (*g*). As regards the liability of ministerial officers, an important distinction to be observed is between cases in which there has been an adjudication and those in which there has been an order only, see *Foster* v. *Dodd*, L. R. 3 Q. B. 67, 76.

(*a*) 10 Q. B. 411. See *Ex parte Fernandez*, 10 C. B. N. S. 3; S. C., 6 H. & N. 717.

(*b*) 9 A. & E. 1, *Id.*

enacts, that all proceedings, whether by action or criminal prosecution, similar to the above, shall be stayed by bringing before the Court or judge a certificate, under the hand of the Chancellor or of the Speaker of the House of Commons, to the effect, that the publication in question is by order of either House of Parliament, together with an affidavit verifying such certificate (*c*).

Constable—liability of at common law.

The case of a justification at common law by a constable under the warrant of a justice of the peace offers another illustration of the rule now under consideration; for if the warrant issued by the justice of the peace, in the shape in which it is given to the officer, is such that the party may lawfully resist it (*d*), or, if taken on it, will be released on habeas corpus, it is a warrant which, in that shape, the magistrate had no jurisdiction to issue, which, therefore, the officer need not have obeyed, and which, at common law, on the principle above laid down, will not protect him against an action at suit of the party injured (*e*). Where the cause is expressed but imperfectly, the officer may not be expected to judge as to the sufficiency of the statement; and, therefore, if the subject-matter be within the jurisdiction of the magistrate, he may be bound to execute it, and, as a consequence, be entitled to protection; but where no cause is expressed, there is no question as to the want of jurisdiction (*f*).

(*c*) *Entick* v. *Carrington*, 19 Howell, St. Tr. 1030, is the leading case in regard to the power of arresting the person, and seizing papers, under a Secretary of State's warrant. See *Leach* v. *Money*, *Wilkes* v. *Wood*, and *Entick* v. *Carrington*, Broom's Const. L. 525, 548, 558, and Note thereto, *Id.* 613 *et seq.*; *Foster* v. *Dodd*, L. R. 3 Q. B. 67.

(*d*) *Reg.* v. *Tooley*, 2 Lord Raym. 1296, 1302.

(*e*) As to the legality of an arrest under a warrant which is not in possession of the constable, in felony and misdemeanour, see *Galliard*, app., *Laxton*, resp., 2 B. & S. 363, and *Reg.* v. *Chapman*, 12 Cox, C. C. 4.

(*f*) *Per* Coleridge, J., 10 Q. B. 390. See in illustration of the re

"A rule," observes Lord *Denman*, C. J., delivering judgment in *Reg.* v. *Inhabitants of Stainforth* (*g*), "has been often recognised in respect of proceedings by magistrates requiring all the facts to be stated which are necessary to show that a tribunal has been lawfully constituted and has jurisdiction. There is good reason for the rule where a special authority is exercised which is out of the ordinary course of common law, and is confined to a limited locality, as in case either of warrants for arrest, commitment, or distress, or of convictions, or orders by local magistrates where the duty of promptly enforcing the instrument is cast on officers of the law, and the duty of unhesitating submission on those who are to obey. It is requisite that the instrument so to be enforced and obeyed should show on inspection all the essentials from which such duties arise."

A plea of justification by a constable acting under the warrant of a justice, will accordingly by the common law be bad, if it does not show that the justice had jurisdiction over the subject-matter upon which the warrant is granted.

Effect of statute 24 Geo. 2, c. 44.

By stat. 24 Geo. 2, c. 44, s. 6, it is enacted, that no action shall be brought against any constable, headborough, or other officer, or against any person or persons acting by his order or in his aid, for anything done in obedience to any warrant under the hand or seal of any justice of the peace, until demand shall have been made for the perusal and copy of such warrant, and the same refused or neglected for the space of six days after such demand; that in case, after such demand and compliance

marks, *supra*, *Clark* v. *Woods*, 2 Exch. 395, and cases there cited.

(*g*) 11 Q. B. 75. See also *Reg.* v. *Inhabs. of Totness*, *Id.* 80; *Agnew* v. *Jobson*, 14 Cox, C. C. 625.

therewith, any action shall be brought against such constable, &c., for any such cause as aforesaid, without making the justice or justices who signed or sealed the said warrant defendant or defendants, then, on producing or proving such warrant at the trial, the jury shall give their verdict for the defendant or defendants, notwithstanding any defect of jurisdiction in such justice or justices; and if such action be brought against the justice and constable jointly, then, on proof of such warrant, the jury shall find for such constable, notwithstanding such defect of jurisdiction as aforesaid: and this statute applies as well where the justice has acted without jurisdiction, as where the warrant which he has granted is improper (*h*).

It should be observed, however, that the officer must show that he acted in obedience to the warrant (*i*), and can only justify that which he *lawfully* did under it (*k*); and where the justice cannot be liable, the officer is not entitled to the protection of the statute; for the Act was intended to make the justice liable instead of the officer: where, therefore, the officer makes such a mistake as will not make the justice liable, the officer cannot be excused.

Statutory protection in general.

Besides the statute 24 Geo. 2, c. 44, above-mentioned, there are other enactments, which, on grounds of public policy, specially extend protection to persons who act *bonâ fide*, though mistakenly, in pursuance of their provisions; and as throwing light upon their practical operation, attention may specially be directed to *Hughes* v. *Buckland* (*l*), which was an action of trespass against

(*h*) *Per* Lord Eldon, C.J., *Price* v. *Messenger*, 2 B. & P. 158; *Atkins* v. *Kilby*, 11 A. & E. 777.

(*i*) See *Hoye* v. *Bush*, 2 Scott, N. R. 86.

(*k*) *Peppercorn* v. *Hoffman*, 9 M. & W. 618, 628.

(*l*) 15 M. & W. 346.

the defendants, being servants of A. B., for apprehending the plaintiff whilst fishing in the night-time near the mouth of a river in which A. B. had a several fishery; at the trial, much evidence was given to show that A. B.'s fishery included the place where the plaintiff was apprehended; the jury, however, defined the limits of the fishery so as to exclude that place by a few yards, but they also found that A. B. and the defendants, "*bonâ fide* and reasonably" believed that the fishery extended over that spot: it was held, that the defendants were entitled to the protection of the stat. 7 & 8 Geo. 4, c. 29, s. 75, which is framed for the protection "of persons acting in the execution" of that Act, and doing anything in pursuance thereof. "The object of the clause in question," observed *Pollock*, C.B., in the course of his judgment, "was to give protection to all parties who honestly pursued the statute. Now, every act consists of *time*, *place*, and *circumstance*. With regard to *circumstance*, it is admitted, that, if one magistrate acts where two are required, or imposes twelve months' imprisonment where he ought only to impose six, he is protected if he has a general jurisdiction over the subject-matter, or has reason to think he has. With respect to *time*, the case of *Cann* v. *Clipperton* (*m*) shows that a party may be protected although he arrests another after the time when the statute authorises the arrest. *Place* is another ingredient; and I am unable to distinguish the present case from that of a magistrate who is protected, although he acts out of his jurisdiction. A party is protected if he acts *bonâ fide*, and in the reasonable belief that he is pursuing the Act of Parliament" (*n*).

(*m*) 10 A. & E. 188.

(*n*) "A thing is considered to be done in pursuance of a statute, when the person who does it is acting honestly and *bonâ fide*, either under the powers which the Act confers, or

And the proper question for the jury in a case such as referred to will be this:—"Did the defendant honestly believe in the existence of those facts which, if they had existed, would have afforded a justification under the statute?"—the belief of the defendant resting upon some reasonable grounds (*o*).

Territorial limits of jurisdiction.

Lastly, we may observe, that, when considered with reference to foreign communities, the jurisdiction of every court, whether *in personam*, or *in rem*, must so far as regards the compelling obedience to its decrees (*p*), necessarily be bounded by the limits of the kingdom in which it is established, and unless, by virtue of international treaties (*q*), such jurisdiction has been extended, it clearly cannot enforce process beyond those natural limits, according to the maxim, *Extra territorium jus dicenti impune non paretur* (*r*). Moreover, it is to be observed that, although the laws of a state *proprio vigore* have no force beyond its territorial limits, they are frequently permitted, by the courtesy of another, to operate in the latter, when neither that state nor its citizens will suffer any inconvenience from the application of the

in discharge of the duties which it imposes." *Per* Parke, B., *Jowle* v. *Taylor*, 7 Exch. 61; *Downing* v. *Capel*, L. R. 2 C. P. 461; *Poulsum* v. *Thirst*, *Id.* 449; *Whatman* v. *Pearson*, L. R. 3 C. P. 422.

(*o*) *Per* Williams, J., *Roberts* v. *Orchard*, 2 H. & C. 774, as explained in *Leete* v. *Hart*, L. R. 3 C. P. 322, 324, 325; *Heath* v. *Brewer*, 15 C. B. N. S. 803; *Chamberlain* v. *King*, L. R. 6 C. P. 474. "The calendar month required by the statute 5 & 6 Vict. c. 97, s. 4, begins at midnight of the day on which the notice was given; and generally it ends at midnight of the day with the corresponding number of the next ensuing month in the calendar;" *per* Blackburn, J., *Freeman* v. *Read*, 4 B. & S. 185, 186.

(*p*) See *per* Lord Cranworth, C., *Hope* v. *Hope*, 4 De G. M. & G. 345-6.

(*q*) See *In re Tivnan*, 5 B. & S. 645.

(*r*) D. 2, 1, 20; Story, Confl. Laws, § 539; arg. *Canadian Prisoners' Case* (rep. by Fry), p. 48; *Reg.* v. *Lewis*, Dearsl. & B. 182; *Reg.* v. *Anderson*, L. R. 1 C. C. 161.

foreign law (*s*). This is the principle of International Comity.

Municipal law may provide that proceedings may be instituted, and judgments and decrees lawfully pronounced, against natural-born subjects when absent abroad, and even against aliens who are not resident within the state when the subject-matter is peculiarly within the jurisdiction of the Courts. The conditions under which a writ will be allowed in this country to issue are regulated by Order XI. of the Rules of Court, 1883 (*t*).

Even Parliament has no power, save in respect of matters of procedure, to legislate for foreigners out of the dominions and beyond the jurisdiction of the British Crown (*u*). "It is clear," observed *Parke*, B., in *Jefferys* v. *Boosey* (*x*), "that the legislature has no power over any persons except its own subjects, that is, persons natural-born subjects or resident or whilst they are within the limits of the kingdom. The legislature can impose no duties except on them; and when legislating for the benefit of persons, must *primâ facie* be considered to mean the benefit of those who owe obedience to our laws, and whose interests the legislature is under a correlative obligation to protect."

(*s*) *Per* Ruggles, C.J., *Hoyt* v. *Thompson*, 1 Selden (U. S.), R. 340. As illustrating the maxim, *supra*, see *Re Mansergh*, 1 B. & S. 400.

(*t*) See Wilson's Judic. Acts, 4th ed. p. 198 *et seq.*

(*u*) *Lopez* v. *Burslem*, 4 Moore, P. C. C. 300, 305.

(*x*) 4 H. L. Cas. 815, 926.

AD QUÆSTIONEM FACTI NON RESPONDENT JUDICES AD QUÆSTIONEM LEGIS NON RESPONDENT JURATORES. (8 *Rep.* 308.)—*It is the office of the judge to instruct the jury in points of law—of the jury to decide on matters of fact* (*a*).

The object in view on the trial of a cause is to find out, by due examination, the truth of the point in issue between the parties, in order that judgment may thereupon be given, and therefore the facts of the case must, in the first instance, be ascertained (usually through the intervention of a jury (*b*)), for *ex facto jus oritur*—the law arises out of the fact (*c*). If the fact be perverted or misrepresented the law which arises thence will unavoidably be unjust or partial; and, in order to prevent this it is necessary to set right the fact and establish the truth contended for, by appealing to some mode of probation or trial which the law of the country has ordained for a criterion of truth and falsehood (*d*).

The tendency of modern reform is to substitute trial before a judge alone for that by judge and jury, and the Rules of Court, 1883 (*e*), may render the employment of juries the exception rather than the rule. In certain important classes of action the ancient mode of trial is certain for a long time to prevail, and the maxim at the head of the chapter must retain considerable importance.

(*a*) Co. Litt. 295 b.; 9 Rep. 13; *Bishop of Meath* v. *Marquis of Winchester*, 3 Bing. N. C. 217; S. C., 4 Cl. & Fin. 557; *Bushell's case*, Vaugh. R. 149; *per* Lord Westbury, *Fernie* v. *Young*, L. R. 1. H. L. 78.

(*b*) As to the province of the jury in ancient times, see Sir F. Palgrave's Essay on the Original Authority of the King's Council, p. 53.

(*c*) See for instance *Catterall* v. *Hindle*, L. R. 2 C. P. 368.

(*d*) 2 Inst. 49.

(*e*) Order XXXVI.

A few instances must suffice to show its application. Thus, there are two requisites to the validity of a deed: 1st, that it be sufficient in law, on which the Court shall decide; 2ndly, that certain matters of fact, as sealing and delivery, be duly proved, on which it is the province of the jury to determine (*f*); and, where interlineations or erasures are apparent on the face of a deed, it is now the practice to leave it to the jury to decide whether the rasing or interlining was done before the delivery (*g*). Examples showing application of rule.

Again, it is the duty of the Court to construe all written instruments (*h*) as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury (*i*); and it is the duty of the jury to take the construction from the Court either absolutely, if there be no words to be construed or explained (*k*), as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained,—or conditionally, when those words or circumstances are necessarily referred to them (*l*).

(*f*) Co. Litt. 255, a.; *Altham's case*, 8 Rep. 308; *Dr. Leyfield's case*, 10 Rep. 92, cited *Jenkin* v. *Peace*, 6 M. & W. 728.

(*g*) Co. Litt. 225, b. See *Doe* d. *Fryer* v. *Coombs*, 3 Q. B. 687; *Alsager* v. *Close*, 10 M. & W. 576. And see the maxim, *ubi eadem ratio ibi idem jus* (*post*, Chap. IV.), where additional cases on this subject are cited.

(*h*) "The construction of a specification, like other written documents, is for the Court. If the terms used require explanation, as being terms of art or of scientific use, explanatory evidence must be given, and with its aid the Court proceeds to the office of construction;" *per* Lord Chelmsford, C., *Simpson* v. *Holliday*, L. R. 1 H. L. 320.

(*i*) Even where a written instrument has been lost, and parol evidence of its contents has been received, its construction is for the Court. *Berwick* v. *Horsfall*, 4 C. B. N. S. 450.

(*k*) See *Elliott* v. *The South Devon R. C.*, 2 Ex. 725.

(*l*) "Parcel or no parcel," is a question of fact for the jury, but the judge should tell the jury what is the proper construction of any documents which may have to be considered in deciding that question; *Lyle* v. *Richards*, L. R. 1 H. L. 222.

The convenience of this course is apparent, for a misconstruction by the Court may be set right upon appeal or new trial, but a mistake by the jury is not easily corrected (*m*). Accordingly, the construction of a doubtful document given in evidence to defeat the Statute of Limitations is for the Court (*n*), and not for the jury; but if it be explained by extrinsic facts, from which the intention of the parties may be collected, they are for the consideration of the jury (*o*).

With respect to mercantile contracts, the law is clearly explained by Lord *Cairns* in *Bowes* v. *Shand* (*p*). It is for the Court, when once it is in possession of the circumstances surrounding the contract, and of any peculiarity of meaning which may be attached by reason of the custom of the trade, to place the construction upon the contract; and it would seem that the evidence of custom must be strong to overrule the natural meaning of words of

(*m*) Judgm., *Neilson* v. *Harford*, 8 M. & W. 823. *Per* Erskine, J., *Shore* v. *Wilson*, 5 Scott, N. R. 988; *Cheveley* v. *Fuller*, 13 C. B. 122. See *per* Maule, J., *Doe* d. *Strickland* v. *Strickland*, 8 C. B. 743-4; *Booth* v. *Kennard*, 2 H. & N. 84; *Bovill* v. *Pimm*, 11 Exch. 718; *Lindsay* v. *Janson*, 4 H. & N. 699, 704; *Parker* v. *Ibbetson*, 4 C. B. N. S. 346.

(*n*) *Chasemore* v. *Turner*, 10 L. R. Q. B. 500; 45 L. J. Q. B. 66; 33 L. T. 323. *Quincey* v. *Sharpe*, 1 Ex. D. 72; 45 L. J. Ex. 347 (Ex. Ch.). *Skeet* v. *Lindsay*, 2 Ex. D. 314; 46 L. J. Ex. 249. *Myerhoff* v. *Froelich*, 3 C. P. D. 333; C. A. 4 C. P. D. 63. *Banner* v. *Berridge*, 18 Ch. D. 254; 50 L. J. Ch. 630.

(*o*) *Morrell* v. *Frith*, 3 M. & W. 402; *Doe* d. *Curzon* v. *Edmonds*, 6 M. & W. 295. See *Worthington* v. *Grimsditch*, 7 Q. B. 479; *Rackham* v. *Marriott*, 2 H. & N. 196; S. C., 1 *Id.* 605; *Sidwell* v. *Mason*, 2 H. & N. 306; *Godwin* v. *Culling*, 4 *Id.* 373; *Cornforth* v. *Smithard*, 5 H. & N. 13; *Buckmaster* v. *Russell*, 10 C. B. N. S. 745; *Holmes* v. *Mackrell*, 3 C. B. N. S. 789; *Cockrill* v. *Sparkes*, 1 H. & C. 699; *Francis* v. *Hawkesley*, 1 E. & E. 1052.

(*p*) 2 App. Ca. 455; 46 L. J. Q. B. 561, explaining *Alexander* v. *Vanderzee*, L. R. 9 C. P. 530 (Ex. Ch.)

common parlance. This rule of construction is based upon and limited by the principle which allows parol evidence to explain, but not to contradict, a written document, upon which basis also depends the function of a jury to put a meaning upon expressions in mercantile contracts, which, apart from mercantile usage, are obscure or meaningless (*q*). It may indeed be laid down generally, that although it is the province of the Court to construe a written instrument, yet where its effect depends not merely on the construction and meaning of the instrument, but upon collateral facts and extrinsic circumstances, the inferences to be drawn from them are to be left to the jury (*r*). And where a contract is made out partly by written documents and partly by parol evidence, the whole must be submitted to the jury so that they may determine what was the real contract, if any, between the parties (*s*).

Malicious prosecution

In actions for malicious prosecution two elements must concur to give the plaintiff a right to recover—absence of reasonable and probable cause for the charge brought against him by the defendant, and malice on the part of the latter. The first of these questions is for the judge, and if he determine it in favour of the plaintiff, the second must then be left to the jury, a course which the judges have frequently described as productive of much

(*q*) *Ashforth* v. *Redford*, L. R. 9 C. P. 20; 43 L. J. C. P. 57.

(*r*) *Etting* v. *U. S. Bank*, 11 Wheaton (U. S.), R. 59.

As to the office of the jury in interpreting an ambiguous contract, see *Smith* v. *Thompson*, 8 C. B. 44, cited *post*, Chap. VIII.

(*s*) *Bolckow* v. *Seymour*, 17 C. B. N. S. 107; *Rogers* v. *Hadley*, 2 H. & C. 227.

The construction of a foreign contract is for the Court, which may avail, as far as necessary, of expert evidence. *Di Sora* v. *Phillips*, 10 H. L. Cas. 633.

difficulty and confusion. Malice may be inferred by the jury from the absence of reasonable and probable cause (*t*), but the inference is not necessary (*u*). Where the question of reasonable and probable cause depends upon more or less numerous and complicated facts and inferences to be derived from them, there is much confusion in the earlier cases as to the respective duties of judge and jury. It is now settled that the question as to reasonable and probable cause is for the judge in all these cases, and that he must direct the jury as to the existence of such cause, according to their findings upon the facts or inferences upon which the defendant relies (*x*).

It is a convenient and not unfrequent course for the judge at Nisi Prius to take the findings of the jury upon the matter of fact in dispute, and then to determine the question of reasonable cause upon their answers, leaving to them that of malice, where he himself has ruled that the defendant acted without reasonable and probable cause. It will be for the jury to say in many cases not only what were the facts as to the charge, but also, what was the knowledge and belief of the defendant with regard to them, and whether he acted *bonâ fide* upon such knowledge (*y*). Where the plaintiff has made out a *primâ facie* case, and the judge, in order to determine the ques-

(*t*) *Basley* v. *Bethune*, 5 Taunt. 583.

(*u*) *Heath* v. *Heape*, 26 L. J. M. C. 49.

(*x*) *Panton* v. *Williams*, 2 Q. B. 169; *Lister* v. *Perryman*, L. R. 4 H. L. 521; 39 L. J. Ex. 177; 23 L. T. 269. This was a case of false imprisonment, but the principle is not affected by the fact that in such an action the onus of showing reasonable and probable cause is on the defendant.

(*y*) *Turner* v. *Ambler*, 10 Q. B. 252; *James* v. *Phelps*, 11 A. & E. 483; *Delegal* v. *Highley*, 3 Bing. N. C. 950; *Heslop* v. *Chapman*, 23 L. J. Q. B. 52; *Hicks* v. *Faulkner*, 8 Q. B. D. 173.

tion of reasonable and probable cause, leaves subsidiary questions of fact to the jury, the onus of proving such facts as tend to establish reasonable and probable cause lies upon the defendant (*z*).

The question of the respective functions of judge and jury, and in actions and prosecutions for libel, was once very warmly canvassed, and was the subject of Fox's Act, 32 Geo. 3, c. 60, s. 1. This Act, which was occasioned by the State Trials in the reign of George 3, enacts (s. 1) that in trials for libel the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue, and shall not be directed or required by the Court to find the defendant guilty or not guilty merely on proof of publication (s. 2). The judge shall, according to his discretion, give his opinion upon the matters in issue (*a*) to the jury, who may (s. 3) find a special verdict. It is customary under this Act for the judge, whether in civil or criminal causes, to give a definition of libel to the jury, and then leave the entire question to the jury. He may, as a matter of mere advice, give his own opinion as to the nature of the publication, but is not bound to do so (*b*). It is the duty of the judge to say whether or not the writing complained of is capable of the meaning ascribed; but if satisfied of that, he must leave it to the jury to say whether it actually has that meaning (*c*). Again, it is for the judge to say whether a communication is privileged or not; but if the privilege is not an absolute one, as that enjoyed by witnesses

Libel.

(*z*) *Abrath* v. *N. E. Railway*, 11 Q. B. D. 79.

(*a*) *Baylis* v. *Lawrence*, 11 Ad. & E. 924.

(*b*) *Parmiter* v. *Copeland*, 6 M. & W. 108; *R.* v. *Watson*, 2 T. R. 106.

(*c*) *Sturt* v. *Blagg*, 10 Q. B. 908; *Hunt* v. *Goodlake*, 43 L. J. C. P. 54. As to slander, *Hemmings* v. *Gasson*, E. B. E. 346; and see *Bushell's case*, Vaugh. R. 147; *Ewart* v. *Jones*, 14 M. & W. 774.

and advocates in a cause, the further question remains whether it was made *bonâ fide* and without malice, and this is always for the jury (*d*). It is to be remembered that where this qualified privilege is established, it has the effect of shifting the onus of proof of malice upon the plaintiff. If he fail to give evidence beyond that of mere defamation, it is the duty of the judge to non-suit (*e*).

Exceptions to rule.

But although the general principle is as above laid down, there are many exceptions to it (*f*). Thus, questions of reasonableness—reasonable cause, reasonable time, and the like—are, strictly speaking, matters of fact, even where it falls within the province of the judge or the Court to decide them (*g*), but are properly left to the judge, as requiring legal training for their appreciation.

So, where a question arises as to the admissibility of evidence, the facts upon which its admissibility depends are to be determined by the judge, and not by the jury. If the opposite course were adopted, it would be equivalent to leaving it to the jury to say whether a particular thing were evidence or not (*h*). And the question, whether a document comes from the proper custody or

(*d*) *Stace* v. *Griffith*, L. R. 2 P. C. 420.

(*e*) *Taylor* v. *Hawkins*, 16 Q. B. 321; *Spill* v. *Maule*, L. R. 4 Ex. 232.

(*f*) Judgm., *Watson* v. *Quilter*, 11 M. & W. 767.

(*g*) See *per* Lord Abinger, C. B., *Startup* v. *Macdonald*, 7 Scott, N. R. 280; Co. Litt. 566; *Burton* v. *Griffiths*, 11 M. & W. 817; *Graham* v. *Van Diemen's Land Co.*, 11 Exch. 101; *per* Crompton, J., *Great Western R. C.* v. *Crouch*, 3 H. & N. 189; *Hogg* v. *Ward*, *Id.* 417; *Goodwyn* v. *Cheveley*, 4 H. & N. 631; *Brighty* v. *Norton*, 3 B. & S. 305; *Massey* v. *Sladen*, L. R. 4 Ex. 13; *Vestry of Shoreditch* v. *Hughes*, 17 C. B. N. S. 137.

(*h*) *Per* Alderson, B., *Bartlett* v. *Smith*, 11 M. & W. 486; *Boyle* v. *Wiseman*, 11 Ex. 360.

whether it is properly stamped must be decided by the judge, for the jury are not sworn to try any such issues (*i*).

There are also certain statutes which give to the Court in particular cases cognizance of certain facts; and there is another and distinct class of cases in which the Court, having a discretionary power over its own process, is called upon to depart from the usual course, upon the suggestion of some matter which renders such departure expedient or essential for the purposes of justice; as where a venue is to be changed because an impartial trial cannot be had, or where the sheriff is a party (*k*).

Nonsuit

If at the close of the plaintiff's case there is no evidence upon which the jury could reasonably and properly find a verdict for him, the judge ought to direct a nonsuit. Formerly, if there were a *scintilla* of evidence in support of a case, the judge was held bound to leave it to the jury. "But a course of recent decisions (most of which are referred to in *Ryder* v. *Wombwell* (*l*)) has established a more reasonable rule, viz., that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed" (*m*). But where there is conflicting evidence upon a question of fact, whatever may be the opinion of the judge as to the value of

(*i*) *Per* Pollock, C. B. *Heslop* v. *Chapman*. 23 L. J. Q. B. 52; *Siordet* v. *Kuczynski*, 17 C. B. 251; *per* Pollock, C. B., *Sharples* v. *Rickard*, 2 H. & N. 57; *Tattersall* v. *Fearnly*, 17 C. B. 368. See 17 & 18 Vict. c. 125, § 31.

(*k*) See some instances mentioned, Judgm. 11 M. & W. 768.

(*l*) L. R. 4 Ex. 32.

(*m*) Judgm. *Giblin* v. *McMullen*, L. R. 2 P. C. 335.

that evidence, he must leave the consideration of it for the jury (*n*).

Misdirection.

When there is a case tried before a judge sitting with a jury, and there arises any question of law mixed up with the facts, the duty of the judge is to give a direction upon the law to the jury, so far as is necessary to make them understand the law as bearing upon the facts before them. When once it is established that a direction was not proper, either wrong in giving a wrong guide, or imperfect in not giving the right guide to the jury, when the facts were such as to make it the duty of the judge to give a guide, the appellate Court cannot inquire whether or no the verdict was wrong, as having been against the weight of evidence or not, but there having been an improper direction, there must be a new trial (*o*).

So, likewise, in a penal action, the Court will grant a new trial when they are satisfied that the verdict is in contravention of law, whether the error has arisen from the misdirection of the judge or from a misapprehension of the law by the jury, or from a desire on their part to take the exposition of the law into their own hands (*p*).

In conclusion, it may be observed that although there is a growing tendency to dispense with juries in many purely civil actions, in cases of a criminal and quasi-criminal nature, most people will probably still agree with Lord *Hardwicke*, that "It is of the greatest consequence to the law of England and to the subject that these powers

(*n*) *Dublin and Wicklow Ry.* v. *Slattery*, 3 App. Cas. 1155; 39 L. T. 365.

(*o*) *Prudential Assurance Co.* v. *Edmunds*, 2 App. Cas. 487; at p. 507. *Per* Ld. Blackburn.

(*p*) See *A.-G.* v. *Rogers*, 11 M. & W. 670, cited in *A.-G.* v. *Sillem*, 2 H. & C. 469.

A new trial cannot be had in a case of felony, *Reg.* v. *Bertrand*, L. R. 1 P. C. 520; *Reg.* v. *Murphy*, 2 *Id.* 35.

of the judge and jury be kept distinct, that the judge determine the law, and the jury the fact; and if ever they come to be confounded it will prove the confusion and destruction of the law of England" (*q*).

IN PRÆSENTIA MAJORIS CESSAT POTENTIA MINORIS. (*Jenk. Cent.* 214.)—*In presence of the major the power of the minor ceases* (*r*).

This maxim has been usually (*s*) cited with special reference to the transcendant nature of the powers vested in the Court of Queen's Bench, now in the Queen's Bench Division of the High Court of Justice (*t*).

It is the function of this Court to keep all inferior jurisdictions within the bounds of their authority and to correct irregularities in their proceedings. It commands magistrates and others to do what their duty requires in every case where there is no other specific remedy. It protects the liberty of the subject by speedy and summary interposition. It takes cognizance both of criminal and civil causes; the former in what is called the Crown side, or Crown Office; the latter in the plea side of the court (*u*). To it also appeal lies from some inferior criminal courts.

To this supremacy of the Court of Queen's Bench may be attributed the fact, that on its coming into any county the power and authority of other criminal tribunals

(*q*) *R.* v. *Poole*, Cas. tem. Hardw. 28.

(*r*) See the maxim, *Omne majus continet in se minus*, *post*, Chap. IV.

(*s*) See 10 Rep. 73, b.; *Lord Sanchar's case*, 9 Rep. 118, b.; 2 Inst. 166.

(*t*) See Rules of Court. 1883, O. LXVIII.

(*u*) *Reg.* v. *Gillyard*, 12 Q. B. 530.

therein situate are *pro tempore* suspended (*x*); *in præsentiâ majoris cessat potestas minoris* (*y*).

It has been held (*z*), however, that the authority of a Court of Quarter Sessions, whether for a county or a borough, is not in law either determined or suspended by the coming of the judges into the county under their commission of assize, oyer and terminer, and general gaol delivery, though "it would be highly inconvenient and improper, generally speaking, for the magistrates of a county to hold their sessions concurrently with the assizes, even in a different part of the county."

§ II. THE MODE OF ADMINISTERING JUSTICE.

Having in the last section considered some maxims relating peculiarly to the judicial office, the reader is here presented with a few which have been selected in order to show the mode in which justice is administered in our courts, and which relate rather to the rules of practice than to the legal principles observed there.

AUDI ALTERAM PARTEM. *No man should be condemned unheard.*

Statement of Rule.

It has long been a received rule (*a*), that no one is to be condemned, punished, or deprived of his property in

(*x*) 4 Inst. 73. See Stat. 25 Geo. 3, c. 18, § 1.

(*y*) *Per* Coleridge, J., 13 Q. B. 740.

(*z*) *Smith* v. *Reg.* 13 Q. B. 738, 744.

(*a*) In *Re Brook*, 16 C. B. N. S. 416, Erle, C. J., says it is "an indispensable requirement of justice that the party who has to decide shall hear both sides, giving each an opportunity of hearing what is urged against him."

any judicial proceeding, unless he has had an opportunity of being heard (*b*); in the words of the moralist and poet—

> *Quicunque aliquid statuerit, parte inauditâ alterâ,*
> *Æquum licet statuerit, haud æquus fuerit* (*c*).

Examples of its application.

A writ of sequestration, therefore, cannot properly issue from the Consistory Court of the diocese to a vicar who has disobeyed a monition from his bishop, without notice previously given to the incumbent, to show cause why it should not issue; for the sequestration is a proceeding partly *in pœnam*, and no proposition is more clearly established than that "a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless, indeed, the Legislature has expressly or impliedly given an authority to act without that necessary preliminary" (*d*).

An award made in violation of the above principle may be set aside (*e*).

No person should be punished for contempt of court, which is a criminal offence, unless the specific offence

(*b*) *Per* Parke, B., *Re Hammersmith Rent-charge*, 4 Ex. 97; *per* Lord Campbell, C.J., *Reg.* v. *Archbishop of Canterbury*, 1 E. & B. 559; *per* Lord Kenyon, C.J., *Harper* v. *Carr*, 7 T. R. 275, and in *R.* v. *Benn*, 6 *Id.* 198; *per* Bayley, B., *Capel* v. *Child*, 2 Cr. & J. 558 (see *Daniel* v. *Morton*, 16 Q. B. 198); *Bagg's case*, 11 Rep. 93 b.; *R.* v. *Chancellor, &c., of University of Cambridge*, 1 Str. 557; *R.* v. *Gaskin*, 8 T. R. 209; *Reg.* v. *Saddler's Co.*, 10 H. L. Cas. 404.

(*c*) Seneca Trag. Medea, cited 6 Rep. 52, a.; 11 Rep. 99, a; *per* Parke, B., Ex. 97; 14 C. B. 165.

(*d*) *Bonaker* v. *Evans*, 16 Q. B. 162, 171, followed, but distinguished in *Bartlett* v. *Kirwood*, 2 E. & B 771. See *Daniel* v. *Morton*, 16 Q. B. 198; *Ex parte Hopwood*, 15 Q. B. 121; *Ex parte Story*, 8 Ex. 195; 12 C. B. 767, 775; *Reynolds* v. *Fenton*, 3 C. B. 187; *Meeus* v. *Thellusson*, 8 Ex. 638; *Ferguson* v. *Mahon*, 11 A. & E. 179.

(*e*) *Thorburn* v. *Barnes*, L. R. 2 C. P. 384, 401; *Re Brook*, 16 C. B. N. S. 403.

charged against him be distinctly stated, and an opportunity of answering it be given to him (*f*). "The laws of God and man," says *Fortescue*, J., in *Dr. Bentley's case* (*g*), "both give the party an opportunity to make his defence, if he has any." And immemorial custom cannot avail in contravention of this principle (*h*).

In conformity also with the elementary principle under consideration, when a complaint has been made, or an information exhibited before a justice of the peace, the accused person has due notice given him, by summons or otherwise, of the accusation against him, in order that he may have an opportunity of answering it (*i*).

A statute establishing a gas-light company enacted that if any person should refuse or neglect, for a period of ten days after demand, to pay any rent due from him to the company for the supply of gas, such rent should be recovered by the company or their clerk by warrant of a justice of the peace and execution thereunder. A warrant issued by a justice under this Act, without previously summoning and hearing the party to be distrained upon, was held to be illegal, though a summons and hearing were not in terms required by the Act; for the warrant is in the nature of an execution; without a summons the party charged has no opportunity of going to the justice, and a man shall not "suffer in person or in purse without an opportunity of being heard" (*k*).

(*f*) *In re Pollard*, L. R. 2 P. C. 106, 120.

(*g*) *R.* v. *Chancellor, &c., of Cambridge*, 1 Str. 557; *per* Maule, J., *Abley* v. *Dale*, 10 C. B. 71; *per* Lord Campbell, C.J., *Ex parte Ramshay*, 18 Q. B. 190; *per* Byles, J., 14 C. B. N. S. 194.

(*h*) *Williams* v. *Lord Bagot*, 3 B. & C. 772.

(*i*) Paley, Conv., 4th ed., 67, 93, where many cases illustrating the text are collected. See *Bessell* v. *Wilson*, 1 E. & B. 489.

(*k*) *Painter* v. *Liverpool Oil Gaslight Co.*, 3 A. & E. 433; *Hammond*

The Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 76, empowers the vestry or district board to alter or demolish a house where the builder has neglected to give notice of his intention to build seven days before proceeding to lay or dig the foundation. Held, that this enactment does not empower the board to demolish such building without first giving the party guilty of the omission an opportunity of being heard (*l*), for "a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds," and "that rule is of universal application and founded upon the plainest principles of justice" (*m*).

Although cases may be found in the books of decisions under particular statutes which at first sight seem to conflict with the maxim, it will be found on consideration that they are not inconsistent with it, for the rule, which is one of elementary justice, only requires that a man shall not be subject to final judgment or to punishment without an opportunity of being heard (*n*).

v. *Bendyshe*, 13 Q. B. 869; *Reg.* v. *Totnes Union*, 7 Q. B. 690; *Bessell* v. *Wilson*, 1 E. & B. 489; *Gibbs* v. *Stead*, 8 B. & C. 528.

(*l*) *Cooper* v. *Wandsworth Board of Works*, 14 C. B. N. S. 180, cited *per* Byles, J., *Re Brook*, 16 C. B. N. S. 419.

(*m*) *Per* Willes, J., 14 C. B. N. S. 190.

(*n*) *Re Hammersmith Rent-charge*, 4 Ex. 87, citing *Re Camberwell Rent-charge*, 4 Q. B. 151, *per* Alderson, B., 4 Ex. 95.

NEMO DEBET ESSE JUDEX IN PROPRIA SUA CAUSA. (12 *Rep.* 113.)—*No man can be judge in his own cause.*

Rule stated.

It is a fundamental rule in the administration of justice, that a person cannot be judge in a cause wherein he is interested (*o*): *nemo sibi esse judex vel suis jus dicere debet* (*p*); and, therefore, in the reign of James I., it was solemnly adjudged that the king cannot take any cause, whether civil or criminal, out of any of his courts, and give judgment upon it himself; but it must be determined and adjudged in some court of justice according to the law and custom of England; and in the case referred to, "the judges informed the king that no king, after the conquest, assumed to himself to give any judgment in any case whatsoever which concerned the administration of justice; but these were solely determined in the courts of justice" (*q*), and *Rex non debet esse sub homine sed sub Deo et lege* (*r*).

It is, then, a rule observed in practice, and of the application of which instances not unfrequently occur, that, where a judge is interested in the result of a cause, he cannot, either personally or by deputy, sit in judgment upon it (*s*). If, for instance, a plea allege a prescriptive

(*o*) *Per* Cur. 2 Stra. 1173; Roll. Abr. Judges, Pl. 11; 4 H. L. Cas. 96, 240.

(*p*) C. 3, 5, 1.

(*q*) *Prohibitions del Roy*, 12 Rep. 63 (cited *Bridgman* v. *Holt*, 2 Show. P. Ca. 126); 4 Inst. 71. In *Gorham* v. *Bishop of Exeter*, 15 Q. B. 52, *S. C.*, 10 C. B. 102, 5 Ex. 630, an argument based on the maxim above exemplified was vainly urged. See also *Ex parte Medwin*, 1 E. & B. 609; *R.* v. *Hoseason*, 14 East, 606.

(*r*) Fleta, fo. 2, c. 5; *ante*, p. 40.

(*s*) *Brooks* v. *Earl of Rivers*, Hardw. 503; *Earl of Derby's Case*, 12 Rep. 114; *per* Holt, C.J., *Anon.* 1 Salk. 396; *Worsley* v. *South Devon R. C.*, 16 Q. B. 539.

right vested in the lord of the manor to seize cattle damage feasant, and to detain the distress until fine paid for the damages, at the lord's will, this prescription will be void, and the plea consequently bad; "because it is against reason, if wrong be done any man, that he thereof should be his own judge (*t*); and it is a maxim of law, that *aliquis non debet esse judex in propriâ causâ, quia non potest esse judex et pars* (*u*); *nemo potest esse simul actor et judex* (*x*); no man can be at once judge and suitor.

Dimes v. *Grand Junction Canal Co.*

A leading case in illustration of this maxim is *Dimes* v. *The Proprietors of the Grand Junction Canal* (*y*) where the facts were as under:—the canal company filed a bill in equity against a landowner in a matter touching their interest as copyholders in certain land. The suit was heard before the Vice-Chancellor, who granted the relief sought by the company, and the Lord Chancellor —who was a shareholder in the company, this fact being unknown to the defendant in the suit—affirmed the order of the Vice-Chancellor. It was held on appeal to the House of Lords, that the decree of the Lord Chancellor was under the circumstances voidable and ought to be reversed. Lord *Campbell*, C. J., observing: "It is of the last importance that the maxim that 'no man is to be a judge in his own cause' should be held sacred. And that is not to be confined to a cause in which he is a party,

(*t*) Litt. § 212.

(*u*) Co. Litt. 141, a.

(*x*) See *Reg.* v. *Great Western R. C.*, 13 Q. B. 327; *Reg.* v. *Dean, &c. of Rochester*, 17 Q. B. 1; followed in *Reg.* v. *Rand*, L. R. 1 Q. B. 230, 233; *Re Ollerton*, 15 C. B. 796; *Re Chandler*, 1 C. B. N. S. 323.

(*y*) 3 H. L. Cas. 759; as to which see *London and North-Western R. C.* v. *Lindsay*, 3 Macq. Sc. App. Cas. 114. *Re Dimes*, 14 Q. B. 554; *Ellis* v. *Hopper*, 3 H. & N. 766; *Williams* v. *Great Western R. C.*, *Id.* 869; *Lancaster and Carlisle R. C.* v. *Heaton*, 8 E. & B. 952.

but applies to a cause in which he has an interest. * * * We have again and again set aside proceedings in inferior tribunals, because an individual, who had an interest in a cause, took a part in the decision. And it will have a most salutary effect on these tribunals when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and should be set aside. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence."

The opinion delivered by the Judges to the House in the case just cited (*z*) shows, however, that the decision of a judge made in a cause in which he has an interest is, in a case of necessity, unimpeachable, *ex. gr.*, if an action were brought against all the Judges of the Court of Common Pleas in a matter over which they had exclusive jurisdiction (*a*), or where a judge commits for contempt of court (*b*). Nor does the principle under consideration apply to avoid the award of a referee to whom, though necessarily interested in the result, parties have contracted to submit their differences (*c*), though ordinarily it is "contrary to reason that an arbitrator or umpire should be sole and uncontrolled judge in his own cause" (*d*).

(*z*) 3 H. L. Cas. 787; citing Year Book, 8 Hen. 6, 19; 2 Roll. Abr. 93.

(*a*) *Per* Lord Cranworth, C., *Ranger v. Great Western R. C.*, 5 H. L. Cas. 88. See *Ex parte Menhennet*, L. R. 5 C. P. 16.

(*b*) *Per* Field, J., *Reg.* v. *B. of St. Albans*, 9 Q. B. D. 454, 457; 46 L. T., 692.

(*c*) *Ranger* v. *Great Western R. C.*, 5 H. L. Cas. 72.

(*d*) *Per* Parke, B., *Re Coombs*, 4 Ex. 841. Russell, Arbitr. 2nd ed. 375.

Conformable to the general rule was a decision in the following case:—Upon an appeal to the Quarter Sessions of the borough of Cambridge, by a water company against an assessment to the poor rate, the deputy recorder of the borough presiding, the rate was reduced and costs given to the appellants; at the time of hearing the appeal the deputy recorder was a shareholder in the company, and although he had in fact sold his shares he had not completed the transfer of them; he was held incompetent to try the appeal (*e*).

In like manner, proceedings had before commissioners under a statute which forbad persons to act in that capacity when interested, have been adjudged void (*f*).

Any direct pecuniary interest, however small, in the subject-matter of inquiry will disqualify a judge (*g*), and any interest will have the same effect, which is sufficiently substantial although not pecuniary. Thus, a justice of the peace may be disqualified if he himself be a litigant in a matter before the Court (*h*), or a party in a similar matter (*i*); but he is not precluded from trying offences under the Cruelty to Animals Prevention Act, 1849, merely because he is a subscriber to the society formed for the purpose of enforcing the Act (*k*). Nor is a justice disqualified from adjudicating upon a summons against a ratepayer in arrear merely upon the ground that he is a member of a

(*e*) *Reg.* v. *Recorder of Cambridge*, 8 E. & B. 637.

(*f*) *Reg.* v. *Aberdare Canal Co.*, 14 Q. B. 854.

(*g*) *Per* Blackburn, J., *Reg.* v. *Rand*, L. R. 1 Q. B. 232.

See further as to the interest which will or will not disqualify, *Wildes* v. *Russell*, L. R. 1 C. P. 722; *Reg.* v. *Manchester, Sheffield, and Lincolnshire R. C.*, L. R. 2 Q. B. 336, 339.

(*h*) *Reg.* v. *Meyers*, 1 Q. B. D. 173; 34 L. T. 247.

(*i*) *Reg.* v. *Justices of Great Yarmouth*, 8 Q. B. D. 525; 51 L. J. M. C. 39.

(*k*) *Reg.* v. *Mayor of Deal*, 45 L. T. 439; 30 W. R. 154.

town council, whose officer has taken out the summons (*l*).

It may be generally stated that a justice of the peace, who is interested in a matter pending before the Court of Quarter Sessions, may not take any part in the proceedings, unless indeed all parties know that he is interested and consent, either tacitly or expressly, to his presence and interference (*m*). In such a case it has been recently held that the presence of one interested magistrate will render the Court improperly constituted, and vitiate the proceedings; it being no answer to the objection, that there was a majority in favour of the decision, without reckoning the vote of the interested party (*n*). And, on the same principle, where a bill preferred before the grand jury at the assizes against a parish for non-repair of a road, the liability to repair which was denied by the parish, had been thrown out by the grand jury, the Court of Queen's Bench granted a criminal information against the parish, on the ground that two members of the grand jury were large landed proprietors therein, and had taken part in the proceedings on the bill, and put questions to the witnesses examined before them; one of

(*l*) *B.* v. *Handsley*, 8 Q. B. D. 383; 51 L. J. M. C. 137. In which *R.* v. *Gibbon*, 6 Q. B. D. was disapproved. *Sed aliter* if the Justice is connected with the prosecution. *R.* v. *Milledge*, 4 Q. B. D. 332; 48 L. J. M. C. 139; *R.* v. *Lee*, 9 Q. B. D. 394; 30 W. R. 460. *E contra R.* v. *Huntingdon*, 4 Q. B. D. 522.

(*m*) *Reg.* v. *The Cheltenham Commissioners*, 1 Q. B. 467; *Wakefield Board of Health* v. *West Riding, &c., R. C.*, 6 B. & S. 794; *Reg.* v. *Justices of West Riding, Id.* 802. "Nothing is better settled than this, that a party aware of the objection of interest cannot take the chance of a decision in his favour, and afterwards raise the objection." *Per* Cockburn, C.J., 6 B. & S. 802. See also *R.* v. *Great Yarmouth JJ.*, 8 Q. B. D. 525; 51 L. J. M. C. 39.

(*n*) *Reg.* v. *Justices of Hertfordshire*, 6 Q. B. 753. See *Re Underwood and Bedford and Cambridge R. C.*, 11 C. B. N. S. 442; *R.* v. *Meyers*, 1 Q. B. D. 173; 34 L. T. 247.

them, moreover, had stated to the foreman that the road in question was useless (*o*); for, "It is very important that no magistrate who is interested in the case before the Court should interfere while it is being heard in any way that may create a suspicion that the decision is influenced by his presence or interference" (*p*).

The mere presence on the bench, however, of an interested magistrate during part of the hearing of an appeal, will not be deemed sufficient ground for setting aside an order of sessions made on such hearing, if it be expressly shown that he took no part in the hearing, came into court for a different purpose, and did not in any way influence the decision (*q*).

It has been laid down (*r*) that "even an Act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for *jura naturæ sunt immutabilia* and they are *leges legum*." But although it is contrary to the general rule of law, not only in this country but in every other, to make a person judge in his own cause, "the legislature can, and no doubt in a proper case would, depart from that general rule," and an intention to do so being clearly expressed, the Courts would give effect to their enactment (*s*). And if a par-

(*o*) *Reg.* v. *Upton St. Leonard's*, 10 Q. B. 827. See *Esdaile* v. *Lund*, 12 M. & W. 734.

(*p*) *Per* Wightman, J., *Reg.* v. *Justices of Suffolk*, 18 Q. B. 416, 421. See *Reg.* v. *Justices of Surrey*, 21 L. J. M C. 195.

(*q*) *Reg.* v. *Justices of London*, 18 Q. B. 421 (*c*).

(*r*) *Day* v. *Savadye*, Hob. 85, 87, cited arg. 5 Exch. 671.

(*s*) *Per* Blackburn, J., *Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. L. 110.

The 40 Vict. c. 11, enacts that no judge of the Superior Courts shall be disqualified from acting in any proceeding upon the ground that he is a ratepayer, or interested in a rating question.

ticular relation is created by statute between A. and B., and a duty is imposed upon A. to investigate and decide charges preferred against B., the maxim *nemo sibi esse judex vel suis jus dicere debet* would not apply (*t*).

Lastly, "There is no ground whatever for saying that the governor of a colony cannot give his official consent to a legislative measure in which he may be individually interested. It might as well be asserted that the sovereign of these realms could not give assent to a bill in Parliament in which the sovereign was personally concerned" (*u*).

ACTUS CURIÆ NEMINEM GRAVABIT. (*Jenk. Cent.* 118.)—*An Act of the Court shall prejudice no man.*

The above maxim "is founded upon justice and good sense; and affords a safe and certain guide for the administration of the law" (*x*). In virtue of it where a case stands over for argument from term to term on account of the multiplicity of business in the Court, or for judgment, from the intricacy of the question, the party ought not to be prejudiced by that delay, but should be allowed to enter up his judgment retrospectively to meet the justice of the case (*y*); and, therefore, if one

(*t*) *Wildes* v. *Russell*, L. R. 1 C. P. 722, 747; *Reg.* v. *Bishop of St. Albans*, 9 Q. B. D. 454 (C. A.); 46 L. T. 692. In this case the curious question was raised, but not decided, whether a bishop, in determining a charge against a clerk which he himself has promoted, may award himself costs.

(*u*) Judgm., *Phillips* v. *Eyre*, L. R. 4 Q. B. 244.

(*x*) *Per* Cresswell, J., 12 C.B. 415.

(*y*) *Per* Garrow, B., 1 Y. & J. 372.

party to an action die during a *curia advisari vult*, judgment may be entered *nunc pro tunc*, for the delay is the act of the Court, and therefore neither party should suffer for it (*z*).

In a case involving issues both of law and fact, the issues of fact were tried in the month of August, 1843, a verdict was found for the plaintiff, and a rule for a new trial was discharged in Trinity Term, 1844; in the same term the demurrers were set down in the special paper, but did not come on for argument until May, 1845, when judgment was given upon them for the plaintiff. The plaintiff having died in March, 1845, the Court made absolute a rule to enter judgment as of Trinity Term, 1844 (*a*). It may be here mentioned that the power of the Court to enter judgment *nunc pro tunc* does not depend upon statute (*b*). It is a power at Common Law, and in accordance with the ancient practice of the Court, adopted in order to prevent prejudice to a suitor from delay occasioned by the act of the Court (*c*).

Where, however, the delay is not attributable to the act of the Court, the maxim *supra* does not apply (*d*).

Again, a peremptory undertaking to proceed to trial is

(*z*) *Cumber* v. *Wane*, 1 Stra. 425; *Moor* v. *Roberts*, 3 C. B. N. S. 844; *per* Tindal, C.J., *Harrison* v. *Heathorn*, 6 Scott, N. R., 797; *Toulmin* v. *Anderson*, 1 Taunt. 384; Jenk. Cent. 180. See *Lanman* v. *Lord Audley*, 2 M. & W. 535.

(*a*) *Miles* v. *Bough*, 3 D. & L. 105, recognising *Lawrence* v. *Hodgson*, 1 Yo. & J. 368, and *Brydges* v. *Smith*, 8 Bing. 29; *Miles* v. *Williams*, 9 Q. B. 47.

(*b*) As to the effect of 17 Car. 2, c. 8, and 15 & 16 Vict. c. 76, s. 139, see Archbold's Practice, 13th ed. 101.

(*c*) *Evans* v. *Rees*, 12 A. & E. 167; *Miles* v. *Bough*, *supra*, and cases there cited; *Vaughan* v. *Wilson*, 4 B. N. C. 116; *Green* v. *Cobden*, 4 Scott, 486.

(*d*) *Freeman* v. *Tranch*, 12 C. B. 406; recognised in *Heathcote* v. *Wing*, 11 Ex. 358; *Fishmonger's Co.* v. *Robertson*, 3 C. B. 970.

not an undertaking to try at all events: and where the plaintiff having peremptorily undertaken to try at a particular sittings, gave notice of trial, and entered the cause as a special jury cause, on the last day, and there being only two days' sittings, it was made a remanet: the Court held that the plaintiff was not in default, so as to entitle the defendant to judgment as in case of a nonsuit, for not proceeding to trial pursuant to the undertaking (*e*).

And if the plaintiff is under a peremptory undertaking to try at a particular sittings, and when the cause comes on to be tried, applies to the judge and obtains leave to pospone it, and it is thereupon postponed, the defendant will not be entitled to make absolute the rule for judgment as in case of a nonsuit, for the non-trial of the cause arose from the act of the judge, not by the neglect of the plaintiff (*f*). Where, however, a plaintiff under a peremptory undertaking to try at the first sitting in term, duly gave notice of trial, but passed the record within two days before the sitting day, and obtained a rule for a special jury, in consequence of which the cause was passed over and made a remanet, the plaintiff was held to have broken his undertaking (*g*); in this case the plaintiff's own act effectually prevented the trial from taking place, as he had undertaken that it should do.

The preceding examples will probably be sufficient to illustrate the general doctrine, which is equally founded on common sense and on authority, that the act of a Court of law shall prejudice no man; and in conformity

(*e*) *Lumley* v. *Dubourg*, 14 M. & W. 295; *Rizzi* v. *Foletti*, 5 C. B. 852; *Rogers* v. *Vandercombe*, 1 B. C. R. 183.

(*f*) *Jackson* v. *Carrington*, 4 Ex. 41. See *Benett* v. *Peninsular and Oriental Steam Boat Co.*, 16 C. B. 29.

(*g*) *Levy* v. *Moylan*, 10 C. B. 657.

with this doctrine, it has been observed, that, as long as there remains a necessity in any stage of the proceedings in an action, for an appeal to the authority of the Court, or any occasion to call upon it to exercise its jurisdiction, the Court has, even if there has been some express arrangement between the parties, an undoubted right, and is, moreover, bound to interfere, if it perceives that its own process or jurisdiction is about to be used for purposes which are not consistent with justice (*h*).

Cases do, however, occur, in which injury is caused by the act of a legal tribunal, as by the laches or mistake of its officer; and where, notwithstanding the maxim as to *actus curiæ*, the injured party is altogether without redress (*i*).

Lastly, it is the duty of a judge to try the causes set down for trial before him, and yet, if he refused to hold his court, although there might be a complaint in Parliament respecting his conduct, no action would lie against him (*k*). So, in the case of a petition to the Crown to establish a peerage, if, in consequence of the absence of peers, a committee for privileges could not be held, the claimant, although necessarily put to great expense, and perhaps exposed to the loss of his peerage by death of witnesses, would be wholly without redress (*l*). In the

(*h*) *Wade* v. *Simeon*, 13 M. & W. 647; *Thomson* v. *Harding*, 3 C. B. N. S. 254; *Sherborn* v. *Lord Huntingtower*, 13 C. B. N. S. 742; *Burns* v. *Chapman*, 5 C. B. N. S. 481, 492.

(*i*) See *Grace* v. *Clinch*, 4 Q. B. 606; *Leech* v. *Lamb*, 11 Ex. 487; *In re Llanbeblig and Llandyfrydog*, 15 L. J. M. C. 92. In *Winn* v. *Nicholson*, 7 C. B. 824, however, Coltman, J., remarks that "no doubt, the Court will correct the mistake of its own officer." See *Wilkes* v. *Perks*, 5 M. & Gr. 376; *Nazer* v. *Wade*, 1 B. & S. 728; *Morgan* v. *Morris*, 3 Macq. Sc. App. Cas. 323.

(*k*) *Ante*, p. 85 *et seq.*

(*l*) Arg. 9 Cl. & F. 275.

above, and other similar cases, a wrong might be inflicted by a judicial tribunal, for which the law could supply no remedy.

ACTUS LEGIS NEMINI EST DAMNOSUS. (2 *Inst.* 287.)—*An act in law shall prejudice no man* (*m*).

Thus, the general principle is, that if a man marry his debtor, the debt is thereby extinguished (*n*); but still a case may be so circumstanced as not to come within that rule; for instance, a bond conditioned for the payment of money after the obligor's death, made to a woman in contemplation of the obligor's marrying her, and intended for her benefit if she should survive, is not released by the marriage, but an action will lie at her suit against the executor; and this results from the principle that the law will not work a wrong, for the bond was given for the purpose of making provision for the wife in the event of her surviving the obligor, and it would be iniquitous to set it aside on account of the marriage, since it was for that very event that the bond was meant to provide (*o*).

So, where the authority given by law has been abused, the law places the party so abusing it in the same situation as if he had, in the first instance, acted wholly without authority (*p*); and this, it has been observed (*q*), is a

(*m*) 6 Rep. 68.

(*n*) 1 Inst. 264, b.

(*o*) *Milbourn* v. *Ewart*, 5 T. R. 381, 385; *Cage* v. *Acton*, 1 Lord Raym. 515; *Fitzgerald* v. *Fitzgerald*, L. R. 2 P. C. 83; *Smith* v. *Stafford*, Hobart, 216. See another instance of rule, *Calland* v. *Troward*, 2 H. Bla. 324, 334; and see *Nadin* v. *Battie*, 5 East, 147; 1 Prest. Abs. of Tit. 346.

(*p*) 6 Bac. Ab. 559, Trespass (B.); *Six Carpenters' case*, 8 Rep. 290, 1 Sm. L. C., cited under the maxim *acta exteriora indicant interiora secreta*, *post*, Chap. V.

(*q*) Arg. 11 Johnson (U. S.), R. 380.

salutary and just principle, founded on the maxim, that the law wrongs no man: *actus legis nemini facit injuriam.*

EXECUTIO JURIS NON HABET INJURIAM. (2 *Inst.* 482.)—*Legal process, if regular, does not afford a cause of action.*

It was a rule of the Roman, as it is of our own, law, that if an action be brought in a court which has jurisdiction, upon insufficient grounds or against the wrong party, no injury is thereby done for which an action can be maintained—*Is qui jure publico utiter non videtur injuriæ faciendæ causâ hoc facere, juris enim executio non habet injuriam* (*r*); and *Nullus videtur dolo facere qui suo jure utitur* (*s*), he is not to be esteemed a wrongdoer who merely avails himself of his legal rights.

(*r*) D. 47, 10, 13, s. 1; Hobart, 266.

(*s*) D. 50, 17, 55.

In connection with this rule may be noticed the following cases:—If an individual prefers a complaint to a magistrate and procures a warrant to be granted upon which the accused is taken into custody, the complainant in such case is not liable in trespass for the imprisonment, even though the magistrate had no jurisdiction. *Brown* v. *Chapman*, 6 C. B. 365, 376. See further on this subject, Broom's Com. One who mistakenly prefers a charge against another before a magistrate will not be liable in trespass for a remand judicially ordered by him. *Lock* v. *Ashton*, 12 Q. B. 871. See also *Freegard* v. *Barnes*, 7 Ex. 827. Nor is an execution creditor liable to the person whose goods have been wrongfully taken in execution for damage sustained by him in consequence of their sale under an interpleader order, *Walker* v. *Olding*, 1 H. & C. 621. The above and similar cases seem properly referable to the rule, *Nullus videtur dolo facere qui jure suo utitur*, D. 50, 17, 55.

On the other hand, a defendant who is taken in execution under a ca. sa. issued on a judgment for less than £20, without the order of the judge who tried the cause, may maintain an action of trespass against the plaintiff and his

This is the primary meaning of the maxim. On the other hand, if an individual, under colour of the law, does an illegal act, or if he abuses the process of the Court to make it an instrument of oppression or extortion, this is a fraud upon the law, by the commission of which liability will be incurred (*t*). In this, which is obviously a different sense, the leading maxim has also been applied.

Examples.

In a leading case (*u*), illustrative of this latter proposition, the facts were as follows:—A *ca. sa.* having been sued out against the Countess of Rutland, and the officers entrusted with the execution of the sheriff's warrant being apprehensive of a rescue, the plaintiff was advised to enter a feigned action in London, according to the custom, against the said countess, to arrest her thereupon, and then to take her body in execution on the *ca. sa.* In pursuance of this advice, the countess was arrested and taken to the Compter, "and at the door thereof the sheriff came, and carried the countess to his house, where she remained seven or eight days, till she paid the debt." It was, however, held, that the said arrest was not made by force of the writ of execution, and was, therefore, illegal; "and the entering of such feigned action was utterly condemned by the whole Court, for, by colour of law and justice, they, by such feigned means, do against law and justice, and so make law and justice the author and cause of wrong and injustice."

attorney; *Brooks* v. *Hodgkinson*, 4 H. & N. 712. See *Gilding* v. *Eyre*, 10 C. B. N. S. 592; *Huffer* v. *Allen*, L. R. 2 Ex. 15.

(*t*) See *per* Pollock, C.B., *Smith* v. *Monteith*, 13 M. & W. 439. "The Court has a general superintending power to prevent its process from being used for the purpose of oppression and injustice." *Per* Jervis, C. J., *Webb* v. *Adkins*, 14 C. B. 407. See *Alleyne* v. *Reg.*, 5 E. & B. 399; *M'Gregor* v. *Barrett*, 6 C. B. 262; *ante*, p. 120.

(*u*) *Countess of Rutland's case*, 6 Rep. 53.

Again, in *Hooper* v. *Lane* (*x*) it was held in accordance with the spirit of the maxim under our notice, that if the sheriff having in his hands two writs of *ca. sa.*, the one valid and the other invalid, arrests on the latter only, he cannot afterwards justify the arrest under the valid writ. Nor can the sheriff, whilst a person is unlawfully in his custody by virtue of an arrest on an invalid writ, arrest that person on a good writ: "to allow the sheriff to make such an arrest while the party is unlawfully confined by him, would be to permit him to profit by his own wrong (*y*) and therefore cannot be tolerated" (*z*).

We shall hereafter (*a*) have occasion to consider the general doctrine respecting the right to recover money paid under compulsion. We may, however, take this opportunity of observing, that, where such compulsion consists in an illegal restraint of liberty, a contract entered into by reason thereof will be void; if, for instance, a man is under duress of imprisonment, or if, the imprisonment being lawful, he is subjected to undue and illegal force and privation, and in order to obtain his liberty, or to avoid such illegal hardship, he enters into a contract, he may allege this duress in avoidance of the contract so entered into; but an imprisonment is not deemed sufficient duress to avoid a contract obtained through the medium of its coercion, if the party was in proper custody under the regular process of a court of competent jurisdiction; and this distinction results from the above rule of law, *executio juris non habet injuriam* (*b*)

(*x*) 6 H. L. Cas. 443.

(*y*) *Post*, Chap. V.

(*z*) *Per* Lord Cranworth, 6 H. L. Cas. 551.

(*a*) See the maxim, *Volenti non fit injuria*, *post*, Chap. V.

(*b*) 2 Inst. 482; *Stepney* v. *Lloyd*, Cro. Eliz. 646; *Anon.*, 1 Lev. 68;

Further, although, as elsewhere stated, an action will not lie to recover damages for the inconvenience occasioned to a party who has been sued by another without reasonable or sufficient cause (*c*), yet, if the proceedings in the action were against A., and a writ of execution is issued by mistake against the goods of B., trespass will clearly lie, at suit of the latter, against the execution creditor (*d*), or against his attorney, who issued execution (*e*); and where an attorney deliberately directs the execution of a warrant, he, by so doing, takes upon himself the chance of all consequences, and will be liable in trespass if it prove bad (*f*). In cases similar to the above, however, the maxim as to *executio juris* is applicable, if at all, only in the secondary sense above noticed; because the proceedings actually taken are *not* sanctioned by the law, and therefore the party taking them, although acting under the colour of legal process, is not protected.

IN FICTIONE JURIS SEMPER ÆQUITAS EXISTIT. (11 *Rep.* 51.)—*Equity is the life of a legal fiction* (*g*).

The meaning of *fiction* in English law is not easily defined. *Fictio*, in the old Roman system, was a tech-

Watcrer v. *Freeman*, Hobart, 266; *R.* v. *Southerton*, 6 East, 140; *Anon*, Aleyn, R. 92; 2 Roll. R. 301.

(*c*) *Per* Rolfe, B., 11 M. & W. 756; and cases cited under the maxim *Ubi jus, ibi remedium, post*, Chap. V.

(*d*) *Jarmain* v. *Hooper*, 7 Scott, N. R. 663; *Walley* v. *M'Connell*, 13 Q. B., 903; see *Riseley* v. *Ryle*, 11 M. & W. 16; *Collett* v. *Foster*, 2 H. & N. 356; *Churchill* v. *Siggers*, 3 E. & B. 929; *Roret* v. *Lewis*, 5 D. & L. 371; *Dimmack* v. *Bowley*, 2 C. B. N. S. 542.

(*e*) *Davies* v. *Jenkins*, 11 M. & W. 745; *Rowles* v. *Senior*, 8 Q. B. 677, and cases there cited.

(*f*) *Green* v. *Elgie*, 5 Q. B. 99.

(*g*) 3 Bl. Com. 43; Co. Litt. 150 a.; 10 Rep. 40 a.; 11 Rep. 50 a.

nical form of pleading, a false averment by one party which the other was not allowed to traverse, *ex. gr.* that, a *peregrinus* was a Roman citizen (*h*). It is, therefore, defined by the commentators as *nihil aliud quam legis adversus veritatem in re possibili ex justâ causâ dispositio* (*i*). The strict meaning of fiction in English jurisprudence is closely allied to *præsumptio juris et de jure*, or irrebuttable presumption of law. There is, however, this difference, that a presumption of law *de jure* assumes a fact which may or may not be true, but which is probably true; while in fiction the falsehood of the assumption is understood and avowed (*k*). *Super falso et certo frigitur, super incerto et vero jure sumitur.* Thus the *presumption* that a child under seven is *doli incapax* is probably true, but the *fiction* was almost certainly false that the plaintiff in former times suing in the Court of Exchequer, was an accountant to the Crown (*l*), and avowedly so that a contract entered into on the high seas had been made at the Royal Exchange in London (*m*). The object of fiction will be apparent if it be considered that every decision of a court of justice involves a syllogism, of which the major premiss is a general proposition of law, the minor is supported by the facts of the particular case, and the conclusion is the decision of the Court. In the infancy of jurisprudence propositions of law were rigid, unbending rules, which lawyers were loath to qualify or weaken by exceptions. In order to arrive at that conclusion to the syllogism

(*h*) Mayne, Ancient Law, Ch. 2.

(*i*) Gothofred ad Dig. lib. 22, tit. 3, s. 3. *Sheffield* v. *Radcliffe*, 2 Rol. R. 502. Palm, 354. Finch, C. L. Bk. 1, c. 5.

(*k*) Best on Presumptions of Law, p. 24.

(*l*) 3 Bl. Com. 46.

(*m*) 3 Bl. Com. 107, 4 Inst. 134.

which justice obviously demanded, the *major* premiss was not touched, but by a fiction of law something was assumed in the *minor* which was avowedly not true. An examination of the older cases would seem to show that fiction originally operated by an averment in the record, which, although known to be false, was for the purpose of doing substantial justice assumed to be true. It must, however, be remarked that fiction is frequently employed in a less accurate sense to include the extension by Courts of Equity of Rules of Law (*n*). The modification of pleading in modern times has tended to diminish the operation of fiction strictly so called, although the effect of its former prevalence is ineradicable. The tendency to set out with truth and detail the actual facts of a case is incompatible with the use of fictitious averments, which are no longer necessary, when the rules of law are themselves modified and developed so as to meet the ends of justice. The analogy between fiction and presumption *juris et de jure* has been already noticed. It may here be added, that while the latter may never be rebutted, and are absolute propositions of the law; of fiction, it has been said, "Although it shall never be contradicted so as to defeat the ends for which it was invented, for every other purpose, it may be contradicted" (*o*). It is not to be used

(*n*) The doctrine that "money to be laid out in land is to be treated as land," long established in Courts of Equity, "is in truth a mere fiction." *Vide per* Kelly, C.B. in *Re De Lancey*, L. R. 4 Ex. 358; S. C., affirmed, 5 *Id.* 102. So the doctrine that a deed executing a power refers back to the instrument creating the power, so that the appointee takes under him who created the power, and not under him who executes it, has been called a fiction; and so it was considered in *Bartlett* v. *Ramsden*, 1 Keb. 570. See also *per* Lord Hardwicke, C., *Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. sen. 78, who explains the above proposition; *Clere's case*, 6 Rep. 17.

(*o*) *Mostyn* v. *Fabrigas*, *per* Lord Mansfield, Cowp. 177; *per* Bramwell, B., *A.-G.* v. *Kent*, 1 H. & C. 28.

at all, except "ad conciliandam æquitatem cum ratione et subtilitate juris" (*p*). Since equity is the life of legal fiction, where substantial justice does not require its interference, still more where it would suffer from its operation, fiction has no place (*q*). Fictions, therefore, are only to be made for necessity, and to avoid mischief (*r*), and must never be allowed to work prejudice or injury to an innocent party (*s*). *Fictio legis neminem lædit, nemini operatur damnum vel injuriam* (*t*).

The following examples must suffice to illustrate the important rule which we have been discussing. If a man disseises me, and during the disseisin cuts down the trees or grass, or the corn growing upon the land, and afterwards I re-enter, I shall have an action of trespass against him, for after my regress the law as to the disseisor and his servants supposes the freehold always to have continued in me; but if my disseisor makes a feoffment in fee, gift in tail, or lease for life or years, and afterwards I re-enter, I shall not have trespass against those who came in by title; for this fiction of the law, that the freehold always continued in me, is moulded to meet the ends of justice, and shall not, therefore, have relation to make him who comes in by title a wrongdoer, but in this case I shall recover all the mesne profits against my disseisor (*u*). It has been held also in a modern case (*x*), that, although the customary heir of a

Examples.

(*p*) Soct. ad Pand. 22, 3, Voct. n. 19.

(*q*) *Johnson* v. *Smith*, 2 Burr. 962, *per* Lord Mansfield, C.J.; and see 10 Rep. 40, *Id.* 89.

(*r*) 3 Rep. 30 a, *Butter and Baker's case.*

(*s*) *Ibid.* 29 b.; 11 Rep. 51 a.; 13 Rep. 21 a.

(*t*) 2 Rol. R. 502; Palmer, 354; also 3 Rep. 36 a.

(*u*) *Lifford's case*, 11 Rep. 51; Hobart, 98, cited *per* Coleridge, J., *Garland* v. *Carlisle*, 4 Cl. & Fin. 710.

(*x*) *Barnett* v. *Earl of Guildford*, 11 Ex. 19, 33.

copyhold tenement cannot maintain trespass without entry, there is after entry a relation back to the time of accruing of the legal right to enter, so as to support an action for trespasses committed prior to such entry; this relation being "created by law for the purpose of preventing wrong from being dispunishable upon the same principle on which the law has given it in other cases."

Again, although for some other purposes the whole assizes are to be considered as one legal day, "the Court is bound, if required for the purpose of doing substantial justice, to take notice that such legal day consists of several natural days, or even of a fraction of a day." Evidence may therefore be adduced to show that an assignment of his goods by a felon *bonâ fide* made for a good consideration after the commission day of the assizes, was in truth made before the day on which he was tried and convicted, and, on proof of such fact, the property will be held to have passed by the assignment (*y*).

And in a recent case, where it appeared that the writ was issued on the 2nd of July, and on the same day, but before the issuing of the writ, the cause of action arose, it was argued, on demurrer, that the issuing of the writ of summons being a judicial act, must be considered as having taken place, at the earliest moment of the day, and therefore before the cause of action accrued. It was held, however, that the Court could take cognizance of

(*y*) *Whitaker* v. *Wisbey*, 12 C. B. 44, 58, 59. See *Reg.* v. *Edwards*, and *Wright* v. *Mills*, cited *ante*, p. 67, and the maxim *de minimis non curat lex*, *post*. There was formerly an analogous fiction relating to judgments in *Lyttleton* v. *Cross*, 3 B. & C. 317, 325, but now *vide* Rules of Court, 1883, O. XLI. r. 3.

the fact, that the writ did not issue until after the act had been committed for which the penalty was sought to be recovered (*z*).

Still less will a legal fiction be raised so as to operate to the detriment of any person, as in destruction of a lawful vested estate, for *fictio legis inique operatur alicui damnum vel injuriam* (*a*). The law does not love that rights should be destroyed, but, on the contrary, for the supporting of them invents notions and fictions (*b*). And the maxim *in fictione juris subsistit æquitas* is often applied by our Courts for the attainment of substantial justice, and to prevent the failure of right (*c*). "Fictions of law," as observed by Lord *Mansfield*, "hold only in respect of the ends and purposes for which they were invented. When they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may show the truth" (*d*).

CURSUS CURIÆ EST LEX CURIÆ. (3 *Bulst.* 53.)—*The practice of the Court is the law of the Court* (*e*).

"Every court is the guardian of its own records and master of its own practice" (*f*); and where a practice

(*z*) *Clarke* v. *Bradlaugh*, 7 Q. B. D. 151; 50 L. J. Q. B. 678.

(*a*) 3 Rep. 36; *per* Cur. *Waring* v. *Dewbury*, Gilb. Eq. R. 223.

(*b*) *Per* Gould, J., *Cage* v. *Acton*, 1 Lord Raym. 516, 517.

(*c*) *Low* v. *Little*, 17 Johnson, R. (U. S.), 348.

(*d*) *Morris* v. *Pugh*, 3 Burr. 1243.

(*e*) "It was a common expression of the late Chief Justice Tindal, that the course of the Court is the practice of the Court;" *per* Cresswell, J., *Freeman* v. *Tranah*, 12 C. B. 414.

"The power of each Court over its own process is unlimited; it is a power incident to all Courts, inferior as well as superior; were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice." *Per* Alderson, B., *Cocker* v. *Tempest*, 7 M. & W. 502, cited, *per* Willes, J., *Stammers* v. *Hughes*, 18 C. B. 535.

(*f*) *Per* Tindal, C. J., *Scales* v. *Cheese*, 12 M. & W. 687; *Gregory* v.

has existed it is convenient (unless in cases of extreme urgency and necessity (*g*) to adhere to it, because it is the practice, even though no reason can be assigned for it (*h*); for an inveterate practice in the law generally stands upon principles that are founded in justice and convenience (*i*). Hence, if any necessary proceeding in an action be informal, or be not done within the time limited for it, or in the manner prescribed by the practice of the Court, it may sometimes be set aside for irregularity, for *via trita via tuta* (*k*); and the Courts of law will not sanction a speculative novelty without the warrant of any principle, precedent, or authority (*l*).

It has been remarked, moreover, that there is a material distinction between those things which are required to be done by the common or statute law of the land, and things required to be done by the rules and practice of the Court. Anything required to be done by the law of the land must be noticed by a court of appellate jurisdiction, but such a court does not of necessity regard the practice of an inferior one (*m*). In matters of procedure and practice, as in matters of discretion, the practice of the

Duke of Brunswick, 2 H. L. Cas. 415; *Mellish* v. *Richardson*, 1 Cl. & Fin. 221, cited *Newton* v. *Boodle*, 6 C. B. 529; *per* Alderson, B., *Ex parte Story*, 8 Ex. 199; *Jackson* v. *Galloway*, 1 C. B. 280; *Reg.* v. *Justices of Denbighshire*, 15 L. J. Q. B., 335; *per* Lord Wynford, *Ferrier* v. *Howden*, 4 Cl. & Fin. 32. But see *Fleming* v. *Dunlop*, 7 Cl. & Fin. 43.

(*g*) See, for instance, *Finney* v. *Beesley*, 17 Q. B. 86.

(*h*) *Per* Lord Ellenborough, C. J., *Bovill* v. *Wood*, 2 M. & S. 25; 15 East, 226; *per* Lord Campbell, C.J., *Edwards* v. *Martyn*, 21 L. J. Q. B. 88; S. C. 17 Q. B. 693.

(*i*) *Per* Lord Eldon, C., Buck, 279. See *per* Lord Abinger, C. B., *Jacobs* v. *Layborn*, 11 M. & W. 690.

(*k*) *Wood* v. *Hurd*, 3 B. N. C. 45; 10 Rep. 142.

(*l*) See judgm. *Ex parte Overseers of Tollerton*, 3 Q. B. 799.

(*m*) *Per* Holroyd, J., *Sandon* v. *Proctor*, 7 B. & C. 806, cited arg. *Bradley* v. *Warburg*, 11 M. & W. 455.

House of Lords has been not to interfere with the decisions of courts below, unless perfectly satisfied that they are based upon erroneous principles (*n*).

Lastly, even where the course of practice in criminal law has been unfavourable to parties accused, and contrary to the principles of justice and humanity, it has been held that such practice constituted the law, and could not be altered without the authority of Parliament (*o*).

CONSENSUS TOLLIT ERROREM. (2 *Inst.* 123.)—*The acquiescence of a party who might take advantage of an error obviates its effect.*

In accordance with this rule, if the venue in an action is laid in the wrong place, and this is done *per assensum partium*, with the consent of both parties, and so entered of record, it shall stand (*p*); and where, by consent of both plaintiff and defendant, the venue was laid in London, it was held, that no objection could afterwards be taken to the venue, notwithstanding it ought, under a particular Act of Parliament, to have been laid in Surrey, for *per Curiam—Consensus tollit errorem* (*q*). Consent cannot, however (unless by the express words of a statute), give jurisdiction (*r*), for mere nullity cannot be waived.

(*n*) *Per* Lord Selborne, *Cowan* v. *Duke of Buccleugh*, 2 App. Cas. 344, at p. 347.

(*o*) *Per* Maule, J., 8 Scott. N. R., 599, 600.

(*p*) *Fineux* v. *Hovenden*, Cro. Eliz. 664; Co. Litt. 126, a., and Mr. Hargrave's note (1); 5 Rep. 37; Dyer, 367. See *Crow* v. *Edwards*, Hob. 5.

(*q*) *Furnival* v. *Stringer*, 1 B. N. C. 68.

(*r*) See *Andrewes* v. *Elliott*, 6 E. & B. 338 (recognised in *Tyerman* v. *Smith*, *ib.* 719, 724), which illustrates the above maxim; *Lawrence* v. *Wilcock*, 11 A. & E. 941; *Vansittart* v. *Taylor*, 4 E. & B. 910, 912.

Doctrine of waiver.

On the maxim under consideration depends also the important doctrine of waiver, that is, the passing by of a thing (*s*); a doctrine which is of very general application both in the science of pleading and in those practical proceedings which are to be observed in the progress of a cause from the first issuing of the writ to the ultimate signing of judgment and execution.

Pleading.

With reference to pleading, however, the rule, that an error will be cured by the consent or waiver of the opposite party, must be taken with considerable limitation; a mere mistake in form is now of little moment, but in the time of Lord *Holt* such an error might have defeated a substantial case, and was condoned if the other party pleaded over to it (*t*). The effect of a demurrer was to admit the truth of all matters which were sufficiently stated in the pleading demurred to, a result which might be obviated by obtaining leave to plead and demur to the same matter. The equivalent of which can now be attained without leave by raising the point of law upon the pleadings (*u*). By pleading over, however, a party was not formerly considered to waive his right to take subsequently any substantial objection in law to the pleading of the other side. It is conceived that, under the system introduced by the Rules of 1883 (*x*), this must still be the case. For the judgment of the Court must ultimately be based upon and consistent with the record, and cannot give to a party that to which, upon his own shewing, he is not in law entitled. It must not, however,

(*s*) Toml. Law. Dict. tit. *Waiver*. See *Earl of Darnley*, v. *London, Chatham, and Dover R. C.*, L. R. 2 H. L. 43; *Ramsden* v. *Dyson*, L. R. 1 H. L. 129, cited *post*.

(*t*) Anon. 2 Falk. 519.

(*u*) Rules, 1883, O. XXV. r. 2.

(*x*) Except in cases where the defendant relies upon the Statute of Frauds or Limitations, which must now, as formerly, be pleaded. O. XIX. r. 15.

be forgotten that the Courts now use the widest discretion in directing such amendments as may be necessary in order to determine the real question in controversy (*y*).

When applied to the proceedings in an action, waiver may be defined to be the doing something after an irregularity committed, and with a knowledge of such irregularity, where the irregularity might have been corrected before the act was done; and it is essential to distinguish a proceeding which is merely irregular from one which is completely defective and void. In the latter case the proceeding is a nullity, which cannot be waived by any laches or subsequent proceedings of the opposite party. Practice.

Where, however, an irregularity has been committed, and where the opposite party knows of the irregularity, it is a fixed rule observed by all the Courts in this country, that he should come in the first instance to avail himself of it, and not allow the other party to proceed to incur expense. "It is not reasonable afterwards to allow the party to complain of that irregularity, of which, if he had availed himself in the first instance, all that expense would have been rendered unnecessary" (*z*); and, therefore, if a party, after any such irregularity has taken place, consents to a proceeding which, by insisting on the irregularity, he might have prevented, he waives all exceptions to the irregularity (*a*). This is a doctrine

(*y*) Jud. Act, 1873, s. 24, s-s. 7, Rules, 1883, O. XXVIII. r. 2.

(*z*) *Per* Lord Lyndhurst, C., *St. Victor* v. *Devereux*, 14 L. J., Ch. 246.

(*a*) *Ex parte* Alcock, 1 C. P. D. 68; 45 L. J. C. P. 86. *Ex parte* Yeatman, 16 Ch. D. 283; 44 L. T. 260. *Beresford* v. *Geddes*, L. R. 2 C. P. 285, 36 L. J. C. P. 115; *Moseley* v. *Simpson*, L. R. 16 Eq. 226; 42 L. J. Ch. 739. *Ex parte Moore*, 2 Ch. D. 802. *Ex parte Morgan*, 2 Ch. D. 772, 45 L. J. Bk. 36, *per* Brett, J.

long established and well known, and extends so far, that a person may be materially affected in a subsequent criminal prosecution by proceedings to the irregularity of which he has, by his silence, waived objection (*b*).

Implied assent.

It may appear in some measure superfluous to add, that the consent which cures error in legal proceedings, may be implied as well as expressed: for instance—where, at the trial of a cause, a proposal was made by the judge in the presence of the counsel on both sides, who made no objection, that the jury should assess the damages contingently, with leave to the plaintiff to move to enter a verdict for the amount found by the jury, it was held that both parties were bound by the proposal, and that the plaintiff's counsel was not therefore at liberty to move for a new trial on the ground of misdirection (*c*), for *qui tacit consentire videtur* (*d*), the silence of counsel implied their assent to the course adopted by the judge, and "a man who does not speak when he ought shall not be heard when he desires to speak (*e*).

COMMUNIS ERROR FACIT JUS. (4 *Inst.* 240.)—*Common error sometimes passes current as law.*

Rule and example.

The law so favours the public good, that it will in some

(*b*) *Reg.* v. *Widdop*, L. R. 2 C. C. R. 3; 42 L. J. M. C. 9.

(*c*) *Morrish* v. *Murrey*, 13 M. & W. 52. *Booth* v. *Clive*, 10 C. B. 827; *Hughes* v. *Great Western R. C.*, 14 C. B. 637. See also *Harrison* v. *Wright*, 13 M. & W. 816.

(*d*) Jenk. cent. 32. See judgment, *Gosling* v. *Veley*, 7 Q. B. 455; *Houldsworth* v. *Evans*, L. R. 3 H. L. 263.

(*e*) 2 Comstock (U. S.), R. 281. See *Martin* v. *Great Northern R. C.*, 16 C. B. 179, 196–7; *Perry* v. *Davis*, 3 C. B. N. S. 769; *Beaudry* v. *Mayor, &c. of Montreal*, 11 Moo. P. C. C. 399.

cases permit a common error to pass for right (*f*); as an instance of which may be mentioned the case of common recoveries, which were fictitious proceedings introduced by a kind of *pia fraus* to elude the statute *de Donis*, and which were at length allowed by the courts to be a bar to an estate tail, so that these recoveries, however clandestinely introduced, became by long use and acquiescence a most common assurance of lands, and were looked upon as the legal mode of conveyance whereby tenant in tai might dispose of his lands and tenements (*g*).

Rule must be qualified.

However, the above maxim, although well known, and therefore here inserted, must be received and applied with very great caution.

"It has been sometimes said," observed Lord *Ellenborough*, "*communis error facit jus*; but I say, *communis opinio* is evidence of what the law is—not where it is an opinion merely speculative and theoretical, floating in the minds of persons; but where it has been made the groundwork and substratum of practice" (*h*). So it was remarked by another learned and distinguished judge (*i*), that he hoped never to hear this rule insisted

(*f*) Noy, Max., 9th ed., p. 37; 4 Inst. 240; *per* Blackburn, J., *Reg.* v. *Justices of Sussex*, 2 B. & S. 680, and in *Jones* v. *Tapling*, 12 C. B. N. S. 846, 847; S. C., 11 H. L. Cas. 290; *Waltham* v. *Sparkes*, 1 Lord Raym. 42. See also the remarks of Lord Brougham in *Phipps* v. *Ackers*, 9 Cl. & Fin. 598 (referring to *Cadell* v. *Palmer*, 10 Bing. 140), and in the *Earl of Waterford's Peerage claim*, 6 Cl. & Fin. 172; also in *Devaynes* v. *Noble*, 2 Russ. & My. 506; *Janvrin* v. *De la Mare*, 14 Moo. P. C. C. 334.

(*g*) Noy, Max., 9th ed., pp. 37, 38; Plowd. 33 b.

(*h*) *Isherwood* v. *Oldknow*, 3 M. & S. 396, 397; *per* Vaughan, B., cited in *Treharne* v. *Layton*, L. R. 10 Q. B. 459, at p. 463, 44 L. J. Q. B. 202; *Garland* v. *Carlisle*, 2 Cr. & M. 95; Co. Litt. 186, a.

(*i*) Mr. Justice Foster, cited *per* Lord Kenyon, C. J., *R.* v. *Eriswell*, 3 T. R. 725; arg. *Smith* v. *Edge*, 6 T. R. 563.

upon, because it would be to set up a misconception of the law in destruction of the law; and, in another case, it was observed that "even *communis error*, and a long course of local irregularity, have been found to afford no protection to one *qui spondet peritiam artis* (*j*). Some useful and stringent remarks on the practical application and value of the above maxim were made also by Lord *Denman*, C. J., delivering judgment in the House of Lords, in a well-known case, involving important legal and constitutional doctrines; in the course of this judgment, which is well worthy of careful perusal, his lordship took occasion to remark, that a large portion of the *legal opinion* which has passed current for law falls within the description of "law taken for granted;" and that, "when in the pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and re-statement of a doctrine—the mere repetition of the *cantilena* of lawyers—cannot make it law, unless it can be traced to some competent authority, and if it be irreconcileable to some clear legal principle" (*k*).

The foregoing remarks may be thus exemplified: A general understanding had prevailed, founded on the practice of a long series of years, that if patented inventions were used in any of the departments of the public service, the patentees would be remunerated by the ministers or officers of the crown administering such departments, as though the use had been by private

(*j*) 6 Cl. & Fin. 199.

(*k*) Lord Denman's judgment in *O'Connell* v. *Reg.*, edited by Mr. Leahy, p. 28. See also the allusions to *Hutton* v. *Balme*, and *Reg.* v. *Millis*, *id.*, pp. 23, 24. *Et vide per* Pollock, C. B., 2 H. & N. 139.

individuals. In numerous instances payments had been made to patentees for the use of patented inventions in the public service, and even the legal advisers of the Crown appeared also to have considered the right as well settled. There was, further, little doubt that on the faith of the understanding and practice many inventors had, at great expense of time and money, perfected and matured inventions, in the expectation of deriving a portion of their reward from the adoption of their inventions in the public service. It was, nevertheless, held that the language of the patent should be interpreted according to the legal effect of its terms, irrespective of the practice (*l*).

But where a decision of the Courts, originally wrong, or an erroneous conception of the law, especially of real property, has been made, for a length of time, the basis upon which rights have been regulated and arrangements as to property made. In such case the maxim, *communis error facit jus* applies (*m*). Indeed, this is strictly in accordance with the view of Lord *Ellenborough*, above cited, and it will be found, that where the Courts of justice have declined to correct misconceptions of long standing, the reluctance has been due to a wholesome fear of interference with titles and vested rights based upon them (*n*).

(*l*) *Feathers* v. *Rey.*, 6 B. & S. 289, 292.

(*m*) *Davidson* v. *Sinclair*, 3 App. Cas. 765, at p. 788, *per* Lord Blackburn, and see his remarks in *Dalton* v. *Angus*, 6 App. Cas. 812; 50 L. J. Q. B. 689. As to error of conveyances in the judgment of Lord Blackburn, in *Brownlie* v. *Campbell*, 5 App. Cas. 925, at p. 948; and *Campbell* v. *Campbell*, *ibid* 787, at p. 815.

(*n*) See *postea omnis innovatio*, &c., and the case of *Bain* v. *Fothergill*, L. R. 7 H. L. 158, *per* Lord Hatherley, at pp. 208, 209, 43 L. J. Ex. 243.

DE MINIMIS NON CURAT LEX. *(Cro. Eliz.* 353.)—*The law does not concern itself about trifles.*

Courts of justice do not in general take trifling and immaterial matters into account (*o*), except under peculiar circumstances, such as the trial of a right, or where personal character is involved (*p*), they will not, for instance, take notice of the fraction of a day, except in those cases where there are conflicting rights, for the determination of which it is necessary that they should do so (*q*); as, for instance, in a claim for demurrage of a ship, in which case it has been expressly held, that a fraction of a day counts for a day (*r*).

New trial when the damages are small.

A familiar instance of the application of this maxim occurs likewise in the rule observed by the Courts at Westminster, that new trials shall not be granted, at the instance either of plaintiff or defendant, on the ground of the verdict being against evidence, where the damages are less than £20 (*s*).

"In ordinary," as remarked by Lord *Kenyon*, C. J. (*t*),

(*o*) Bell, Dict. and Dig. of Scotch Law, 284; *per* Sir. W. Scott, 2 Dods. Adm. R., 163; *Graham* v. *Berry*, 3 Moo. P. C. C. N. S. 223.

(*p*) *Joyce* v. *Metrop. Bd. of Works*, 4 L. T. 81.

(*q*) Judgm., 14 M. & W. 582; *per* Holt, C. J., 2 Lord Raym. 1095; *Reg.* v. *St. Mary, Warwick*, 1 E. & B. 816; *Wright* v. *Mills*, 4 H. & N. 488, 493, 494; *Evans* v. *Jone*, 3 H. & C. 423; *Page* v. *Moore*, 15 Q. B. 684-6; *Clarke* v. *Bradlaugh*, 7 Q. B. D. 151; *Campbell* v. *Strangeways*, 3 C. P. D. 105; 37 L. J. M. C. 6. In case of copyright, see *Boosey* v. *Purday*, 4 Exch. 145; *Chatterton* v. L. R. 10 C. P. 573.

(*r*) *Commercial S. S. Company* v. *Boulton*, L. R. 10 Q. B. 346.

(*s*) *Branson* v. *Didsbury*, 12 A. & E. 631; *Manton* v. *Bales*, 1 C. B. 444; *Macrow* v. *Hull*, 1 Burr. 11; *Burton* v. *Thompson*, 2 Burr. 664; *Apps* v. *Day*, 14 C. B. 112; *Hawkins* v. *Alder*, 18 C. B. 640; see *Allum* v. *Boultbee*, 9 Exch. 738, 743; *per* Maule, J., 11 C. B. 653.

(*t*) *Wilson* v. *Rastall*, 4 T. R. 753. See *Vaughan* v. *Wyatt*, 6 M. & W. 496, 497; *per* Parke, B., *Twigg* v. *Potts*, 1 Cr., M. & R. 93;

"where the damages are small, and the question too inconsiderable to be retried, the Court have frequently refused to send the case back to another jury. But wherever a mistake of the judge has crept in and swayed the opinion of the jury, I do not recollect a single case in which the Court have ever refused to grant a new trial."

Trifling injuries.

In further illustration of the maxim, *de minimis non curat lex*, we may observe that there are some injuries of so small and little consideration in the law that no action will lie for them (*u*); for instance, in respect to payment of tithe, the principle which may be extracted from the cases appears to be, that for small quantities of corn, involuntarily left in the process of raking, tithe shall not be payable, unless there be any particular fraud or intention to deprive the parson of his full right. Where however a farmer pursued such a mode of harvesting barley, that a considerable quantity of rakings was left scattered after the barley was bound into sheaves, the Court held, that tithe was payable in respect of these rakings, although no actual fraud was imputed to the farmer, and although he and his servants were careful to leave as little rakings as possible in that mode of harvesting the crop (*x*).

Lee v. *Evans*, 12 C. B. N. S. 368; *Mostyn* v. *Coles*, 7 H. & N. 872, 876. In *Haine* v. *Davey*, 4 A. & E. 852, a new trial was granted for misdirection, though the amount in question was less than £1. See *Poole* v. *Whitcomb*, 12 C. B. N. S. 770.

(*u*) See *per* Powys, J., *Ashby* v. *White*, 2 Lord Raym. 944, answered by Holt, C. J., *id.* 953; *Whitcher* v. *Hall*, 5 B. & C. 269, 277; 2 Bla. Com. 21st ed., 262, where the rule respecting land gained by alluvion is referred to the maxim treated of in the text. The maxim "would apply only with respect to gradual accretions not appreciable except after the lapse of time," *per* Pollock, C. B., 2 H. & N. 138; and in *Ford* v. *Lacey* 7 *id.* 155.

(*x*) *Glanville* v. *Stacey*, 6 B. & C. 543.

Trespass to realty.

It may be observed, however, that for an injury to real property incorporeal, an action may be supported, however small the damage, and therefore a commoner may maintain an action on the case for an injury done to the common, though his proportion of the damage be found to amount only to a farthing (*y*).

Where trifling irregularities or even infractions of the strict letter of the law are brought under the notice of the Court, the maxim *de minimis non curat lex* is of frequent practical application (*z*). It has, for instance, been applied to support a rate, in the assessment of which there were some comparatively trifling omissions of established forms (*a*). So, with reference to proceedings for an infringement of the revenue laws (*b*), Sir *W. Scott* observed —"The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim, *de minimis non curat lex.* Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked."

(*y*) *Pindar* v. *Wadsworth*, 2 East, 154. See 22 Vin. Abr. "Waste," (N.); *Harrop* v. *Hirst*, L. R. 4 Ex. 43, and other cases cited *post*, Chap. V.

(*z*) See in connection with criminal liability for a nuisance, *Reg.* v. *Charlesworth*, 16 Q. B. 1012; *Reg.* v. *Betts*, *id.* 1022; *Reg.* v. *Russell*, 3 E. & B. 942.

(*a*) *White* v. *Beard*, 2 Curt. 493. But where the amount of a poor-rate so much in the pound on the assessable value of premises involves the fraction of a farthing, a demand by the overseer of the whole farthing is excessive and illegal. *Morton*, app., *Brammer*, resp., 8 C. B. N. S. 791, 798, citing *Baxter* v. *Eaulam*, 1 Wils. 129.

(*b*) *The Reward*, 2 Dods. Adm. R., 269, 270.

Lastly, in an indictment against several for a misdemeanour all are principals, because the law does not descend to distinguish different shades of guilt in this class of offences. Indictment for misdemeanour.

OMNIS INNOVATIO PLUS NOVITATE PERTURBAT QUAM UTILITATE PRODEST. (2 *Bulstr.* 338.)—*Every innovation occasions more harm and derangement of order by its novelty, than benefit by its abstract utility.*

It has been an ancient observation in the laws of England, that, whenever a standing rule of law, of which the reason, perhaps, could not be remembered or discerned, has been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule has in the end appeared from the inconveniences that have followed the innovation (*c*); and the judges and sages of the law have therefore always suppressed new and subtle inventions in derogation of the common law (*d*).

It is, then, an established rule to abide by former precedents, *stare decisis*, where the same points come again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also, because the law in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent, is now become a

(*c*) 1 Black. Com. 60. See Ram's Science of Legal Judgment, 112 *et seq.*

Lord Bacon tells us in his Essay on Innovations, that, "as the births of living creatures at first are ill-shapen, so are all innovations which are the births of time."

(*d*) Co. Litt. 282 b., 379 b.; *per* Grose. J., 1 M. & S. 394.

permanent rule, which it is not in the breast of any subsequent judge to alter or swerve from according to his private sentiments; he being sworn to determine, not according to his own private judgment (*e*), but according to the known laws and customs of the land—not delegated to pronounce a new law, but to maintain and expound the old one (*f*)—*jus dicere et non jus dare* (*g*).

"The province of the legislature is not to construe but to enact, and their opinion not expressed in the form of law as a declaratory provision would be, is not binding on courts whose duty is to expound the statutes they have enacted" (*h*); for the maxim of the Roman law, *ejus est interpretari cujus est condere* (*i*), does not under our constitution hold.

Our common-law system, as remarked by a learned judge, consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents (*k*); and for the

(*e*) See *per* Lord Camden, 19 Howell, St. T., 1071; *per* Williams, J., 4 Cl. & Fin. 729; *per* Best, C. J., *Newton* v. *Cowie*, 4 Bing. 241; *per* Alderson, B., 4 Ex. 806.

(*f*) *Per* Lord Kenyon, C.J., 5 T. R. 682; 6 *id.* 605; and 8 *id.* 239; *per* Grose, J., 13 East, 321; 9 Johnson (U.S.), R. 428; *per* Lord Hardwicke, C., *Ellis* v. *Smith*, 2 Ves. jun. 16.

(*g*) 7 T. R. 696; 1 B. & B. 563; Ram's Science of Legal Judgment, p. 2; arg. 10 Johnson (U.S.), R. 566; "My duty," says Alderson, B., in *Miller* v. *Salomons*, 7 Ex. 543, "is plain. It is to expound and not to make the law—to decide on it as I find it, not as I may wish it to be;" and see *per* Colman, J., 4 C. B. 560–561.

(*h*) Judgm., 14 M. & W. 589.

(*i*) See Tayl. Civ. L., 4th ed., 96.

(*k*) As to the value of precedents, Palgr. Orig. Auth. King's Council, 9, 10. "An unnecessary departure from precedents, whether it spring from the love of change, or be the result of negligence or ignorance on the part of the pleader, ought not to be encouraged. It can only lead to useless litigation, delay, and expense." See *per* Cur. *Austin* v. *Holmes*, 3 Denio (U.S.), R. 224.

sake of attaining uniformity, consistency, and certainty, we must apply those rules where they are not plainly unreasonable and inconvenient to all cases which arise, and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. "It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science" (*l*).

Settled law must not be disturbed.

Accordingly where a rule has become settled law, it is to be followed, although some possible inconvenience may grow from a strict observance of it, or although a satisfactory reason for it is wanted, or although the principle and the policy of the rule may be questioned (*m*). If, as has been observed, there is a general hardship affecting a general class of cases, it is a consideration for the legislature, not for a court of justice. If there is a particular hardship from the particular circumstances of the case, nothing can be more dangerous or mischievous than upon those particular circumstances to deviate from a general rule of law (*n*); "hard cases," it has repeatedly been said, are apt to "make bad law" (*o*), and *misera est servitus*

(*l*) *Per* Parke, J., *Mirehouse* v. *Rennell*, 1 Cl. & Fin. 546. "When the law has become settled, no speculative reasoning upon its origin, policy, or expediency, should prevail against it." 3 Denio (U.S.), R. 50.

(*m*) *Per* Tindal, C. J., *Mirehouse* v. *Rennell*, 8 Bing. 557. See the authorities cited, Ram's Science of Legal Judgment, 33–35, and *Smith* v. *Doe*, 7 Price, 509; S. C., 2 B. & B. 599. *Ralston* v. *Hamilton*, 4 Macq., Sc. App. Cas. 405, *per* Lord Westbury, C.

(*n*) *Per* Lord Loughborough, 2 Ves. jun., 426, 427; *per* Tindal, C. J., *Doe* d. *Clarke* v. *Ludlam*, 7 Bing. 180; *per* Pollock, C. B., *Reg.* v. *Woodrow*, 15 M. & W. 412; *per* Wilde, C. J., *Kepp* v. *Wiggett*, 16 L. J. C. P. 237; S. C., 6 C. B. 280.

(*o*) See 4 Cl. & Fin. 378; *per*

ubi jus est vagum aut incertum (*p*)—obedience to law becomes a hardship when that law is unsettled or doubtful; which maxim applies with peculiar force to questions respecting real property; as, for instance, to family settlements, by which provision is made for unborn generations; "and if, by the means of new lights occurring to new judges, all that which was supposed to be law by the wisdom of our ancestors, is to be swept away at a time when the particular limitations are to take effect, mischievous indeed will be the consequence to the public (*q*).

It is for considerations such as those just noticed that the Courts are reluctant to upset former decisions which, although anomalous, have been accepted by the public as the basis of their transactions for a length of time, a rule embodied in the maxim above considered, *communis error facit jus* (*r*). It is pointed out by Lord Hatherley in *Bain* v. *Fothergill* (*s*) that the House of Lords has frequently acted upon the mistaken practice of conveyancers, and will regard the necessity for following previous decisions as more imperative, where the common dealings of mankind are in question. However, it has been said that the House of Lords, as the Court of ultimate appeal, considers itself bound by former decisions

Coleridge, J., 4 H. L. Cas. 611. "It is necessary that courts of justice should act on general rules, without regard to the hardship which in particular cases may result from their application." Judgm. 4 Exch. 718. See also Judgm. 3 Exch. 278.

(*p*) 4 Inst. 246; *Shepherd* v. *Shepherd*, 5 T. R. 51 n. (*a*); 2 Dwarr. Stats. 786; Bac. Aphorisms, vol. 7, p. 148; arg. 9 Johnson (U. S.), R. 427, and 11 Peters (U. S.), R. 286.

(*q*) *Per* Lord Kenyon, C. J., *Doe* v. *Allen*, 8 T. R. 504. See *per* Ashhurst, J., 7 T. R. 420, and see *per* Brett, L. J., *Hearne* v. *Bellman*, 4 Ex. D. 210; 48 L. J. Ex. 681.

(*r*) V. P. 134, and cases there referred to.

(*s*) L. R. 7 H. L. p. 158 at p. 209.

of its own tribunal, although clearly wrong (*t*). This principle has not been adopted by other Courts in matters in which they may have ultimate appellate jurisdiction.

With respect to matters which do not affect existing rights or properties to any great degree, but tend principally to influence the *future* transactions of mankind, it is for similar reasons generally considered more important that the rule of law should be settled, than that it should be theoretically correct (*u*).

When rule does not hold.

The judicial rule—*stare decisis* (*x*)—does, however, admit of exceptions, where the former determination is most evidently contrary to reason,—much more, if it be clearly contrary to the divine law. But, even in such cases, subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For, if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined (*y*).

We may appropriately conclude these remarks with observing that, whilst on the one hand innovation on settled law is to be avoided, yet "the mere lateness of time at which a principle has become established is not a strong argument against its soundness, if nothing has been previously decided inconsistent with it, and it be in itself consistent with legal analogies" (*z*). Nay, it

(*t*) V. *per* Brett, J. in Hadfield's case, L. R. 8 C. P. 306, 42 L. J. C. P. 146.

(*u*) See *per* Lord Cottenham, C., *Lozon* v. *Pryse*, 4 My. & Cr. 617, 618.

(*x*) As to which, see *Gifford* v. *Livingston*, 2 Denio (U.S.), R. 392-3.

(*y*) 1 Black. Com. 60.

(*z*) Judgm. *Gosling* v. *Veley*, 7 Q. B. 441; *per* Lord Denman, C.J., 10 Q. B. 950.

is even true that "a froward retention of custom is as turbulent a thing as an innovation; and they that reverence too much old times are but a scorn to the new" (*a*).

(*a*) Bacon's Essays, "Of Innovations."

CHAPTER IV.

RULES OF LOGIC.

THE maxims immediately following have been placed together, and intitled "Rules of Logic," because they result from simple processes of reasoning. Some of them, indeed, may be considered as axioms, the truth of which is self-evident, and consequently admit of illustration only. A few examples have in each case been given, showing how the particular rule has been held to apply, and other instances of a like nature will readily suggest themselves to the reader (*a*).

UBI EADEM RATIO IBI IDEM JUS. (*Co. Litt.* 10 a.)—*Like reason doth make like law* (*b*).

The law consists, not in particular instances and precedents, but in the reason of the law (*c*); for reason is the life of the law,—nay, the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, acquired by long study, observation, and experience, and not of every man's natural reason (*d*).

(*a*) The title of this division of the subject has been adopted from Noy's Maxims, 9th ed., p. 5.

(*b*) Co. Litt. 10 a.

(*c*) *Ashby* v. *White*, 2 Lord Raym. 957; the judgment of Lord Holt in this celebrated case well illustrates the position in the text.

(*d*) Co. Litt. 97 b.

The following instances will serve to show in what manner the above maxim may be practically applied :—

Illustration of rule.

When any deed, as a bond, is altered in a point *material* (*e*) by the obligee, or by a stranger without his privity, the deed thereby becomes void (*f*) ; for the law will not permit a man to take the chance of committing a fraud, and when that fraud is detected, of recovering on the instrument as it was originally made. In such a case the law intervenes, and says, that the deed thus altered no longer continues the same deed, and that no person can maintain an action upon it ; and this principle of the law is calculated to prevent fraud and to deter men from tampering with written securities (*g*). The broad principle thus recognised has been likewise established in regard to bills of exchange and promissory notes (*h*) ; on all such instruments a duty arises analogous to the duty arising on deeds, and "a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state." The law having been long settled as

(*e*) *Secus*, if the alteration be in a point immaterial, *Aldous* v. *Cornwell*, L. R. 3 Q. B. 573, where the action was on a promissory note. See *Andrews* v. *Lawrence*, 19 C. B. N. S. 768.

(*f*) *Pigot's case*, 11 Rep. 26 b., cited *Davidson* v. *Cooper*, 11 M. & W. 799 : S. C., in error, 13 *Id.* 343. *Whelpdale's case*, 5 Rep. 119 a ; *per* Lord Denman, C.J. *Harden* v. *Clifton*, 1 Q. B. 524 ; *Agricultural Cattle Insurance Co.* v. *Fitzgerald*, 16 Q. B. 432 ; *Doe* d. *Tatum* v. *Catomore*, 16 Q. B. 745 ; *Keane* v. *Smallbone*, 17 C. B. 179 ; arg. *Bamberger* v. *Commercial Credit Mutual Ass. Soc.*, 15 C. B. 676, 692. See *Gollan* v. *Gollan*, 4 Macq. Sc. App. Cas. 585.

(*g*) *Master* v. *Miller*, 4 T. R. 320 ; S. C. affirmed in error, 2 H. Bla. 140. *Gardner* v. *Walsh*, 5 E. & B. 83 (overruling *Catton* v. *Simpson*, 8 A. & E. 136) ; *Burchfield* v. *Moore*, 3 E. & B. 683 ; *Saul* v. *Jones*, 1 E. & E. 63 ; *Warrington* v. *Early*, 2 E. & B. 763. See *Green* v. *Attenborough*, 3 H. & C. 468 ; *West* v. *Steward*, 14 M. & W. 47 ; *Fazakerley* v. *M'Knight*, 6 E. & B. 795 ; *Hamelin* v. *Bruck*, 9 Q. B. 306.

(*h*) *Master* v. *Miller*, 4 T. R. 320.

to deeds, was held to be also applicable to those mercantile instruments, which, though not under seal, yet possess properties, the existence of which, in the case of deeds, was, it must be presumed, the foundation of the rule above stated,—*ubi eadem est ratio eadem est lex;* and therefore in the case below cited, it was held that an *unauthorised* (*i*) alteration in the date of a bill of exchange after acceptance, whereby the payment would be accelerated, even when made by a stranger, avoids the instrument, and that no action can be afterwards brought upon it by an innocent holder for a valuable consideration (*k*). An alteration in the date of a cheque has been recently held to have a similar effect (*l*); and the principle was carried even further in the case of *Suffell* v. *Bank of England*, where it was held that an alteration of the numbers and ciphers on Bank of England notes will invalidate such notes, the alteration being material to the currency (*m*). The same doctrine has been extended to the case of bought and sold notes; and it was held, that a vendor, who, after the bought and sold notes had been exchanged, prevailed on a broker, without the consent of the vendee, to add a term to the bought note, for his (the vendor's) benefit, thereby lost all title to recover against the vendee (*n*). And the same principle applies to a

(*i*) See *Tarleton* v. *Shingler*, 7 C. B. 812; 4 Scott, N. R. 732, n. (29).

(*k*) *Master* v. *Miller*, *supra*; *Hirschfeld* v. *Smith*, L. R. 1 C. P. 340; *Lord Falmouth* v. *Roberts*, 9 M. & W. 471; Judgm. *Davidson* v. *Cooper*, 11 M. & W. 800; S. C. in error, 13 M. & W. 343; *Mason* v. *Bradley*, 11 M. & W. 590; *Parry* v. *Nicholson*, 13 M. & W. 778; *Gould* v. *Coombs*, 1 C. B. 543; *Bradley* v. *Bardsley*, 14 M. & W. 378; *Crotty* v. *Hodges*, 5 Scott, N. R. 221; *Bell* v. *Gardiner*, 4 Scott, N. R. 621; *Baker* v. *Jubber*, 1 *Id.* 26. See *Harrison* v. *Cotgreave*, 4 C. B. 562.

(*l*) *Vance* v. *Lowther*, 1 Ex. D. 176; 45 L. J. Ex. 200.

(*m*) 9 Q. B. D. 555; 51 L. J. Q. B. 401.

(*n*) *Powell* v. *Divett*, 15 East, 29; *Mollett* v. *Wackerbarth*, 5 C. B. 181.

guarantee, for that it is a good ground of defence that the instrument has, whilst in the plaintiff's hands, received a material alteration (*o*) from some person to the defendant unknown, and without his knowledge or consent (*p*).

So, the insertion of material words in the margin of a charter-party by the broker, even without the knowledge of the owner, has in a recent case (*q*) been held to make it void as against the charterer.

We may add, in connection with the subject here touched upon, that, inasmuch as a deed cannot be altered, after it is executed, without fraud or wrong, and the presumption is against fraud or wrong, interlineations or erasures apparent on the face of a deed will be presumed to have been made before its execution; but, as a testator may alter his will after execution without fraud or wrong, the presumption is, that an alteration (*r*) appearing on its face, was, in the absence of evidence to the contrary, made subsequent to its execution (*s*).

Caution necessary in reasoning.

There are, however, some things, for which, as Lord *Coke* observes, no reason can be given (*t*): and with reference to which the words of the civil law hold true—*non omnium quæ à majoribus constituta sunt ratio reddi*

(*o*) See *Sanderson* v. *Symonds*, 1 B. & B. 426.

(*p*) *Davidson* v. *Cooper*, 11 M. & W. 778, 800; S. C., 13 M. & W. 343; *Parry* v. *Nicholson*, 13 M. & W. 773; *Mason* v. *Bradley*, 11 M. & W. 590; *Hemming* v. *Trenery*, 9 A. & E. 926; *Calvert* v. *Baker*, 4 M. & W. 407.

(*q*) *Croockewit* v. *Fletcher*, 1 H. & N. 893. As to the effect of an erasure in an affidavit, see *Re Bingle*, 15 C. B. 449. As to altering a record, see *Suker* v. *Neale*, 1 Exch. 468.

(*r*) There is, however, a "marked distinction" between an alteration and an interlineation. *In the goods of Cadge*, L. R. 1 P. & D. 543.

(*s*) *Doe* d. *Tatum* v. *Catomore*, 16 Q. B. 745; *Doe* d. *Shallcross* v. *Palmer*, *Id.* 747; *In the goods of Hardy*, 30 L. J., P. M. & A. 143.

(*t*) *Hix* v. *Gardiner*, 2 Bulstr. 196; cited arg. *Leuekhart* v. *Cooper*, 3 Bing. N. C. 104.

potest (*u*); and, therefore, we are compelled to admit, that in the legal science, *qui rationem in omnibus quærunt rationem subvertunt* (*x*). It is, indeed, sometimes dangerous to stretch the invention to find out legal reasons for what is undoubted law (*y*); and this observation applies peculiarly to the mode of construing an Act of Parliament, in order to ascertain and carry out the intention of the legislature: in so doing, the judges will bend and conform their legal reason to the words of the Act, and will rather construe them literally, than strain their meaning beyond the obvious intention of Parliament (*z*). The spirit of the maxim prefixed to these remarks, here, however, manifestly prevails; for, as we read in the Digest (*a*), *non possunt omnes articuli singillatim aut legibus aut senatûs-consultis comprehendi: sed cum in aliquâ causâ sententia eorum manifesta est, is, qui jurisdictioni præest, ad similia procedere atque ita jus dicere debet. Nam, ut ait Pedius, quotiens lege aliquid unum vel alterum introductum est, bona occasio est, cætera, quæ tendunt ad eamdem utilitatem, vel interpretatione, vel certe jurisdictione suppleri.*

Qualification of general proposition.

Further, although it is laid down that the law is the perfection of reason, and that it always intends to conform thereto, and that what is not reason is not law, yet this must not be understood to mean, that the particular reason of every rule in the law can at the present day be always precisely assigned: it is sufficient if there be nothing in it flatly contradictory to reason, and then

(*u*) D. 1, 3, 20.

(*x*) 2 Rep. 75, a.

(*y*) *Per* Alderson, B., *Ellis* v. *Griffith*, 16 M. & W. 110.

(*z*) T. Raym. 355, 356; *per* Lord Brougham, C., *Leith* v. *Irvine*, 1 My. & K. 289. As to the mode of construing Acts of Parliament, see further, *post*, Chap. VIII.

(*a*) D. 1, 3, 12, and 13.

the law will presume that the rule in question is well founded, *multa in jure communi*, as Lord *Coke* observes, *contra rationem disputandi, pro communi utilitate introducta sunt* (*b*)—many things have been introduced into the common law, with a view to the public good, which are inconsistent with sound reason. *Quod verò contra rationem juris receptum est, non est producendum ad consequentias* (*c*).

Reasonableness of custom.

The maxim cited from Lord *Coke*, is peculiarly applicable when the reasonableness of an alleged custom has to be considered: in such a case, it does not follow, from there being at this time no apparent reason for such custom, that there never was (*d*). If, however, it be in tendency contrary to the public good, or injurious or prejudicial to the many, and beneficial only to some particular person, such custom is and must be repugnant to the law of reason, for it could not have had a reasonable commencement (*e*).

Again—A clerk who has held preferment in one bishopric is not, on being presented to a living in another bishopric, bound, as a condition precedent to his examination on the question of fitness, to produce letters testimonial and commendatory from his former bishop—if such a rule existed a door would thus be opened to very arbitrary and capricious proceedings, rendering the title of the clerk and the right of the patron dependent on the will of the prior bishop—such a conclusion would be at variance with

(*b*) Co. Litt. 70 *b*. *Multa autem jure civili contra rationem disputandi pro utilitate communi recepta esse innumerabilibus rebus probari potest*; D. 9, 2, 51, § 2.

(*c*) D. 1, 3, 14.

(*d*) Arg. *Tyson* v. *Smith*, in error, 9 A. & E. 406, 416.

(*e*) Judgm., 9 A. & E. 421, 422. See further as to the reasonableness and validity of a custom, *post*, Chap. X.

reason, and therefore repugnant to what is called "the policy of the law" (*f*).

We may conclude these remarks with calling to mind the well-known saying: *lex plus laudatur quando ratione probatur* (*g*)—then is the law most worthy of approval, when it is consonant to reason; and with Lord *Coke* we may hold it to be generally true, "that the law is unknown to him that knoweth not the reason thereof, and that the known certainty of the law is the safety of all" (*h*).

CESSANTE RATIONE LEGIS CESSAT IPSA LEX. (*Co. Litt.* 70 *b.*)—*Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself* (*i*).

Examples: Privilege from arrest.

For instance, a Member of Parliament is privileged from arrest during the session, in order that he may discharge his public duties, and the trust reposed in him; but the reason of this privilege ceases at a certain time after the termination of the parliamentary session, because the public has then no longer an immediate interest in the personal freedom of the individuals composing the representative body, and *cessante causâ cessat effectus* (*k*).

(*f*) *Bishop of Exeter* v. *Marshall*, L. R. 3 H. L. 17, 54.

(*g*) 1 Inst. Epil., cited *per* Lord Kenyon, C.J., *Porter* v. *Bradley*, 3 T. R. 146; and *Dalmer* v. *Barnard*, 7 *Id*, 252; arg. *Doe* d. *Cadogan* v. *Ewart*, 7 A. & E. 657.

(*h*) 1 Inst. Epil. "Certainty is the mother of repose, and therefore the common law aims at certainty;" *per* Lord Hardwicke, C., 1 Dick. 245.

(*i*) 7 Rep. 69; *per* Willes, C.J., *Davis* v. *Powell*, Willes, 46, cited arg. 8 C. B. 786.

(*k*) See arg. Cas. *temp.* Hardw. 32; *Gowdy* v. *Duncombe*, 1 Exch. 430.

Trees excepted from demise.

Again, where trees are excepted out of a demise, the soil itself is not excepted, but sufficient nutriment out of the land is reserved to sustain the vegetative life of the trees, for, without that, the trees which are excepted cannot subsist; but if, in such a case, the lessor fells the trees, or by the lessee's license grubs them up, then, according to the above rule, the lessee shall have the soil (*l*). The same principle applies where a right exists of common *pur cause de vicinage:* a right depending upon a general custom and usage, which appears to have originated, not in any actual contract, but in a tacit acquiescence of all parties for their mutual benefit. This right does not, indeed, enable its possessor to put his cattle at once on the neighbouring waste, but only on the waste which is in the manor where his own lands are situated; and it seems that the right of common of vicinage should merely be considered as an excuse for the trespass caused by the straying of the cattle, which excuse the law allows by reason of the ancient usage, and in order to avoid the multiplicity of suits which might arise where there is no separation or inclosure of adjacent commons (*m*).

Common *pur cause de vicinage.*

But the parties possessing the respective rights of common, may, if they so please, inclose against each other, and, after having done so, the right of common *pur cause de vicinage* can no longer be pleaded as an excuse to an action of trespass if the cattle stray, for *cessante ratione legis cessat lex* (*n*).

(*l*) *Lilford's case*, 11 Rep. 49, cited *Hewitt* v. *Isham*, 7 Exch. 79, and *post*, Chap. VI. s. 3.

(*m*) *Jones* v. *Robin*, 10 Q. B. 581, 626. See also *Clarke* v. *Tinker*, *Id.* 604; *Prichard* v. *Powell*, *Id.* 589.

(*n*) 4 Rep. 38; Co. Litt. 122 a.; Finch, Law, 8; *per* Powell, J., *Broomfield* v. *Kirber*, 11 Mod. 72; *Gullett* v. *Lopes*, 13 East, 348;

Law as to validity of marriage.

As regards the consent of parents to the marriage of their minor children, the Judge Ordinary recently observed (*o*) that "any analogy which existed between marriages by banns and marriages by notice to the registrar has been effaced—the attempt at securing that consent in marriages to the latter class by publicity relinquished—and the procurement of actual consent substituted in the same manner as had always been used in marriages by licence. There is no reason, therefore, why those decisions which have hitherto only been applied to marriages by banns, and which have their foundation in the necessity for securing that publicity through which it is the object of banns to reach the parents' consent, should be applied to marriages in which that consent is otherwise attained and secured, *cessante ratione cessat et lex.*"

Another illustration is afforded by the rule, which, through neglect of the principle under discussion has often been misunderstood, viz., that a person may not make felony the foundation of a civil action. This is true only where the felon himself is defendant or a necessary party, and the claim is founded on the felony. "The rule is founded on a principle of public policy, and where the *public policy ceases to operate,* the rule shall cease also and the familiar phrase, 'The action is merged in the felony' is not at all times literally true" (*p*).

judgm. *Wells* v. *Pearcy*, 1 Bing. N. C. 556, 566; *Heath* v. *Elliott*, 4 Bing. N. C. 338.

(*o*) *Holmes* v. *Simmons*, L. R. 1 P. & D. 528.

(*p*) *Per* Lord Tenterden, *Stone* v. *Marsh*, 6 B. & C. 551, at p. 564. V. also interesting review of this question by Watkin Williams, J. in *Midland Insurance Co.* v. *Smith*, 6 Q. B. D. 561; 51 L. J. Q. B. 329; and *Rooper* v. *D'Avigdor*, 10 Q. B. D. 412.

DE NON APPARENTIBUS ET NON EXISTENTIBUS EADEM EST RATIO. (5 *Rep.* 6.)—*That which does not appear will not be presumed to exist* (*q*).

Maxim, how applied.

The above "old and well-established maxim in legal proceedings," which "is founded on principles of justice as well as of law" (*r*); applies where reliance is placed by a party on deeds or writings which are not produced in court, and the loss of which cannot be accounted for or supplied in the manner which the law has prescribed, in which case they are to be treated precisely as if non-existent (*s*).

Special verdict

On the consideration of a special verdict, the Court will neither assume a fact not stated therein nor draw inferences of facts necessary for the determination of the case from other statements contained therein (*t*).

In reading an affidavit also, the Court will look solely at the facts deposed to, and will not presume the existence of additional facts or circumstances in order to support the allegations contained in it. To the above, therefore, and similar cases occurring not only in civil, but also in criminal proceedings, the maxim *quod non apparet non est* (*u*)—that which does not appear must be taken in law as if it were not (*x*)—is emphatically applicable.

Bond.

In an action by two commissioners of taxes (*y*) on a

(*q*) See *per* Buller, J., *R.* v. *Bishop of Chester*, 1 T. R. 404, arg. 5 C. B. 53; *per* Cockburn, C. J., *Reg.* v. *Overseers of Walcot*, 2 B. & S. 560.

(*r*) See 12 Howard (U.S.) R. 253.

(*s*) Bell's Dict. of Scotch Law, 287

(*t*) *Tancred* v. *Christy*, 12 M. & W. 316; *Caudrey's case*, 5 Rep. 5; *ante*, p. 103.

(*u*) 2 Inst. 479; Jenk. Cent. 207.

(*x*) Vaugh. R. 169.

(*y*) *Gwynne* v. *Burnell*, 6 Bing. N. C. 453; S. C., 1 Scott, N. R. 711; 7 Cl. & Fin. 572.

bond against the surety of a tax-collector, appointed under the provisions of the stat. 43 Geo. 3, c. 99, it appeared that the Act contained a proviso that no such bond should be put in suit against the surety for any deficiency, other than what should remain unsatisfied after sale of the lands, tenements, &c., of such collector, in pursuance of the powers given to the commissioners by the Act; it further appeared, that, at the time when the said bond was put in suit, the obligor had lands, &c., within the jurisdiction of the plaintiffs, but of which they had no notice or knowledge: it was held, that seizure and sale of lands and other property of the collector, of the existence of which the commissioners had no notice or knowledge, was not a condition precedent to their right to proceed against the surety; this conclusion resulting, as was observed, from the plain and sound principle contained in the above maxim (*z*).

Notice of dishonour.

So, where a notice of dishonour of a bill of exchange described the bill generally as "Your draft on A. B.," the Court held, on motion for a nonsuit, that if there were other bills or drafts to which the notice could refer, it was for the defendant to show such to be the fact; and as he had not done so, that the above maxim must be held to apply; for, inasmuch as it did not appear that there were other bills or notes, the Court could not presume that there were any (*a*).

Increase *per alluvionem.*

Again, the increase *per alluvionem* is described to be when the sea, by casting up sand and earth by degrees, increases the land, and shuts itself within its previous

(*z*) *Per* Vaughan, J., 6 Bing. N. C. 539; S. C., 1 Scott, N. R. 798. See arg. *Mather* v. *Thomas*, 10 Bing. 47.

(*a*) *Shelton* v. *Braithwaite*, 7 M. & W. 436; *Bromage* v. *Vaughan*, 9 Q. B. 608; *Mellersh* v. *Rippen*, 7 Exch. 578.

limits (*b*). In general, the land thus gained belongs to the Crown, as having been a part of the very *fundus maris;* but if such alluvion be formed so imperceptibly and insensibly, that it cannot by any means be ascertained that the sea ever was there—*idem est non esse et non apparere,* and the land thus formed belongs as a perquisite to the owner of the land adjacent (*c*).

Process of court.

Lastly, it has been suggested (*d*) that "there is a distinction between process of superior and inferior courts; in the former, *omnia præsumuntur ritè esse acta* (*e*), in the latter the rule *de non apparentibus et non existentibus eadem est ratio* applies."

NON POTEST ADDUCI EXCEPTIO EJUSDEM REI CUJUS PETITUR DISSOLUTIO. (*Bac. Max. reg.* 2.)—*A matter, the validity of which is at issue in legal proceedings, cannot be set up as a bar thereto.*

Where the legality of some proceeding is the subject-matter in dispute between two parties, he who maintains its legality, and seeks to take advantage of it, cannot rely upon the proceeding itself, as a bar to the adverse party. It is obvious that to do so would involve the logical fallacy of *petitio principii,* and would in many cases preclude all redress to an aggrieved party. "It were impertinent and

(*b*) See *Gifford* v. *Lord Yarborough,* 5 Bing. 163.

(*c*) Hale, De Jure Maris, pt. 1, c. 4, p. 14; *R.* v. *Lord Yarborough,* 3 B. & C. 96, 106; S. C., 1 Dow, N. S. 178. This right has also been referred to the principle, *de minimis non curat lex,* arg. 3 B. & C. 99.

(*d*) Arg. *Kinning* v. *Buchanan,* 8 C. B 286.

(*e*) A presumption which appears to be sound, *per* Lord Chelmsford, L. R. 5 H. L. 234, at p. 248, see *post,* Chap. X.

contrary in itself," says Lord *Bacon*, "for the law to allow of a plea in bar of such matter as is to be defeated by the same suit, for it is included; and otherwise a man could never arrive at the end and effect of his suit" (*f*).

Instances: Attainder.

A few instances will be sufficient to show the application of this rule. Thus, if a man be attainted and executed, and the heir bring error upon the attainder, it would be bad to plead corruption of blood by the same attainder; for otherwise the heir would be without remedy ever to reverse the attainder (*g*). In like manner, although a person attainted cannot be permitted to sue for any civil right in a court of law, yet he may take proceedings, and will be heard for the purpose of reversing his attainder (*h*).

On the same principle, in a court of equity, although a party in contempt is not generally entitled to take any proceeding in the cause, he will nevertheless be heard if his object be to get rid of the order or other proceeding which placed him in contempt, and he is also entitled to be heard for the purpose of resisting or setting aside for irregularity any proceedings subsequent to his contempt (*i*). And where a man does not appear on a vicious proceeding, he is not to be held to have waived that very objection which is a legitimate cause of his non-appearance (*k*).

(*f*) Bac. Max. reg. 2. *Pusey* v. *Desbouvrie*, 3 P. Wms. 317.

(*g*) Bac. M. reg. 2. *Loukes* v. *Holbeach*, 4 Bing. 420, 424, cited and commented on, *Byrne* v. *Manning*, 2 Dowl. N. S. 403.

(*h*) See 1 Taunt. 84, 93.

The same principle applies in the case of proceedings to reverse outawry. Jenk. Cent. 106; Finch, Law, 46; *Matthews* v. *Gibson*, 8 East, 527; *Craig* v. *Levy*, 1 Exch. 570.

(*i*) *Per* Lord Cottenham, C., *Chuck* v. *Cremer*, 1 Coop. 205; *King* v. *Bryant*, 3 My. & Cr. 191. See 1 Daniell, Ch. Pr., 3rd ed., 354 *et seq.*

(*k*) *Per* Knight Bruce, V. C., 15 L. J. (Bankruptcy) 7.

Appeal.

Where the judge of an inferior court had illegally compelled a plaintiff who appeared to be nonsuited, and, upon a bill of exceptions being brought, the nonsuit was entered on the record, the defendant was not allowed to contend that the entry on record precluded the plaintiff from showing that he had refused to consent to the nonsuit, for that would have been setting up as a defence the thing itself, which was the subject of complaint,—a course prohibited by the above maxim (*l*). So, the judgment or opinion of the court below cannot, with propriety, be cited as an authority on the argument, because such judgment and opinion are then under review (*m*).

Extension of rule.

The principal maxim seems also to apply, when the matter of the plea is not to be avoided in the same but in a different suit: and, therefore, if a writ of error be brought to reverse an outlawry in any action, outlawry in another action shall not bar the plaintiff in error; for otherwise, if the outlawry was erroneous, it could never be reversed (*n*); the general rule, however, being that an outlaw cannot enforce any proceeding for his own benefit (*o*).

(*l*) *Strother* v. *Hutchinson* 4 Bing. N. C. 83, 90; cited arg. *Penney* v. *Slade*, 5 Bing. N. C. 327; commented on and distinguished in *Corsar* v. *Reed*, 17 Q. B. 540.

(*m*) See *per* Alexander, C. B., *R.* v. *Westwood*, 7 Bing. 83; *per* North, C. J., *Barnardiston* v. *Soame*, 6 St. Tr. 1094. See also, in further illustration of the above maxim, *Masters* v. *Lewis*, 1 Lord Raym. 57.

(*n*) Jenk. Cent. 37; Gilb. For. Rom. 54. See Bac. Max. reg. 2.

(*o*) *Per* Parke, B., *Reg.* v. *Lowe*, 8 Exch. 698. See *Re Pyne*, 5 C. B. 467; *Davis* v. *Trevanion*, 2 D. & L. 743; *Walker* v. *Thelluson*, 1 Dowl. N. S. 578.

ALLEGANS CONTRARIA NON EST AUDIENDUS. (*Jenk. Cent.* 16.)—*He is not to be heard who alleges things contradictory to each other.*

The above, which is obviously an elementary rule of logic, and applied with corresponding frequency in our courts of justice, will receive occasional illustration in the course of this work. We may for the present observe that it expresses, in technical language, the trite saying of Lord *Kenyon*, that a man shall not be permitted to "blow hot and cold" with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interest (*p*).

In *Cave* v. *Mills* (*q*), the maxim under notice was by the majority of the Court of Exchequer held applicable. There the plaintiff was surveyor to the trustees of certain turnpike roads; as such surveyor it was his duty to make all contracts, and to pay the amounts due for labour and materials required for the repair of the roads, he being

(*p*) See *Wood* v. *Dwarris*, 11 Exch. 493; *Andrews* v. *Elliott*, 5 E. & B. 502; *Tyerman* v. *Smith*, 6 E. & B. 719; *Morgan* v. *Couchman*, 14 C. B. 100; *Humblestone* v. *Welham*, 5 C. B. 195; *Williams* v. *Thomas*, 4 Exch. 479; *Taylor* v. *Best*, 14 C. B. 487; *Rej.* v. *Evans*, 3 E. & B. 363; *Williams* v. *Lewis*, 7 E. & B. 929; *General Steam Navigation Co.* v. *Slipper*, 11 C. B. N. S. 493; *Elkin* v. *Baker*, *Id.* 526, 543; *Green* v. *Sichel*, 7 C. B. N. S. 747; *Pearson* v. *Dawson*, E. B. & E. 448; *Haines* v. *East India Co.*, 11 Moo. P. C. C. 39; *Smith* v. *Hodson*, 4 T. R. 211, 217; *Brewer* v. *Sparrow*, 7 B. & C. 310; *Lythgoe* v. *Vernon*, 4 H. & N. 180.

A man is not entitled to stand by and allow proceedings to go on against him to judgment, and then to ask the Court to interfere on his behalf on the ground that his name was misspelt. Judgm. *Churchill* v. *Churchill*, L. R. 1 P. & D. 486.

(*q*) 7 H. & N. 913. See *Van Hasselt* v. *Sack*, 13 Moo. P. C. C. 185.

authorized to draw on the treasurer to a certain amount. His expenditure, however, was not strictly limited to that amount, and in the yearly accounts presented by him to the trustees a balance was generally claimed as due to him, and was carried to the next year's account. Accounts were thus rendered by the plaintiff for three consecutive years showing certain balances due to himself. These accounts were audited, examined, and allowed by the trustees at their annual meeting, and a statement based on them of the revenue and expenditure of the trust was published as required by stat. 3 Geo. 4, c. 126, s. 78. The trustees, moreover, believing the accounts to be correct, paid off with monies in hand a portion of their mortgage debt. The plaintiff afterwards claimed a larger sum in respect of payments which had in fact been made by him, and which he ought to have brought into the accounts of the above years, but had knowingly omitted. It was held that the plaintiff was estopped from recovering the sums thus omitted, for "a man shall not be allowed to blow hot and cold—to affirm at one time and deny at another—making a claim on those whom he has deluded to their disadvantage, and founding that claim on the very matters of the delusion. Such a principle has its basis in common sense and common justice, and whether it is called 'estoppel,' or by any other name, it is one which courts of law have in modern times most usefully adopted."

Estoppel.

The doctrine of *estoppel*, at any rate by deed and in pais, is in great measure a development of the principle expressed in this maxim. Indeed, the learned editor of Smith's Leading Cases, who was the first to reduce to any system the many applications of the theory of estoppel, would seem to connect estoppel by *record* also with the

present maxim. He defines estoppel generally (*r*) as a conclusive admission, or something which the law treats as equivalent to an admission.

It is impossible within the limits of this present work to give a satisfactory account of estoppel. The reader is referred to Smith's Leading Cases (*s*), and the maxim *nullus commodum capere potest de injuria sua propria* (*t*), where some account will be found of *estoppel in pais*. There are, however, cases in which estoppel operates to preclude a person from contradicting that which has been accepted and acted upon as truth and fact by others, under circumstances which do not constitute *injuria, i.e.* wilful and culpable deception. Such cases are referable to the present rather than to the maxim just cited. An illustration of this is afforded by the case of *Prentice* v. *London Building Society* (*u*). In that case to an action by a transferree of shares against the trustee of the Society, the latter pleaded that the matter was a dispute between the Society and a person claiming on account of a member, and one that ought to be settled by arbitration. It appeared at the trial that the shares in respect of which the plaintiff claimed had been forfeited by the defendants to make good a debt due from an absconding secretary who had transferred them to the plaintiff. It was accordingly held that as the trustees denied the right of the plaintiff to be a member of the Society, they were estopped from saying that the dispute was one with a member.

So where a vendor has recognised the right of his

(*r*) Sm. L. C. 8th ed. 803.
(*s*) *Duchess of Kingston's case.*
(*t*) *Postea*, p. 273 ; 44 L. J. C. P. 353.
(*u*) L. R. 10 C. P. 679 ; v. also *Smith* v. *Baker*, L. R. 8 C. P. 35 ; 42 L. J. C. P. 155.

vendee to dispose of goods remaining in the actual possession of the vendor, he cannot defeat the right of a person claiming under the vendee on the ground that no property passed to the latter by reason of the want of a specific appropriation of the goods (*x*). Nor can an individual who has procured an act to be done sue as one of several co-plaintiffs for the doing of that very act (*y*). Where a party accepts costs under a judge's order, which, but for such order, would not at that time be payable, he cannot afterwards object that the order was made without jurisdiction (*z*). And if A. agrees with B. to pay him so much per ton for manufacturing and selling a substance invented and patented by B., it is not competent to A., having used the invention by B.'s permission, to plead in answer to an action for monies due in respect of such use that the patent was void and the licence given superfluous (*a*). And a licensee of a patent cannot in any way question its validity during the continuance of the licence (*b*). A person cannot act under an agreement and at the same time repudiate it (*c*).

Again, "where a person is charged as a member of a partnership, not because he is a member, but because he has represented himself as such, the law proceeds on the principle, that if a person so conducts himself as to lead

(*x*) *Woodley* v. *Coventry*, 2 H. & C. 164.

(*y*) *Brandon* v. *Scott*, 7 E. & B. 234.

(*z*) *Tinkler* v. *Hilder*, 4 Exch. 187. See *Wilcox* v. *Odden*, 15 C. B. N. S. 837; *Freeman* app., *Read* resp., 9 C. B. N. S. 301.

(*a*) *Lawes* v. *Purser*, 6 E. & B. 930. See *Harrup* v. *Bayley*, 6 E. & B. 218, cited under the maxim *volenti non fit injuria*, *post*, Chap. V.

(*b*) *Clark* v. *Adie*, 2 App. Cas. 423; 46 L. J. Ch. 585.

(*c*) *Crossley* v. *Dixon*, 10 H. L. 293, 310; v. also *Morrison* v. *Universal Marine Insurance Co.*, L. R. 8 Ex. 40; S. C. *ibid.* 197; 42 L. J. Ex. 115.

another to imagine that he fills a particular situation, it would be unjust to enable him to turn round and say that he did not fill that situation. If, therefore, he appears to the world—or as the common and more correct expression is, if he appears to the party who is seeking to charge him—to be a partner, and has represented himself as such, he is not allowed afterwards to say that that representation was incorrect, and that he was not a partner (*d*). So a person cannot in the same transaction buy in the character of principal, and at the same time charge the seller for commission as his agent (*e*). And a person acting professedly as agent for another, may be estopped from saying that he was not such agent (*f*). Also it seems a true proposition that "where parties have agreed to act upon an assumed state of facts, their rights between themselves depend on the conventional state of facts, and not on the truth (*g*), and it is not competent to either party afterwards to deny the truth of such statement (*h*).

So, where rent accruing due subsequently to the expiration of a notice to quit, is paid by the tenant and accepted by the landlord, that is an act of the parties which evidences an intention that the tenancy should be considered as still subsisting. So, if there be a distress, the distrainor affirms by a solemn act that a tenancy sub-

(*d*) *Per* Rolfe, B., *Ness* v. *Angas*, 3 Exch. 813.

(*e*) *Salomons* v. *Pender*, 3 H. & C. 639.

(*f*) *Rogers* v. *Hadley*, 2 H. & C. 227.

(*g*) Blackb. Contr. Sale, 163. As *e.g.* a valued policy in Marine Insurance, which however does not effect estoppel for purposes collateral to the contract, *per* Lord Selborne, *Burnand* v. *Rodoconachi*, 7 App. Cas. 333 at p. 335; 50 L. J. Q. B. 284.

(*h*) *M'Cance* v. *London and North Western R. C.*, 3 H. & C. 343.

sists; and it is not competent to him afterwards to deny it (*i*).

In like manner, the maxim under consideration applies, in many cases, to prevent the assertion of titles inconsistent with each other, and which cannot contemporaneously take effect (*k*). And it is laid down that "a person who has a power of appointment, if he chooses to create an estate or a charge upon his estate, by a voluntary act, cannot afterwards use the power for the purpose of defeating that voluntary act;" and if a bond be given to the Crown under the stat. 33 Hen. 8, c. 39, binding all lands over which he has at the time of executing the bond a disposing power, the giving such bond is to be deemed a voluntary act on the part of the obligor, so that he cannot by afterwards exercising the power, defeat the right of the Crown (*l*).

No one shall derogate from his own grant.

Closely allied with the principle of the decisions just noticed, is the rule of law that "a man shall not derogate from his own grant," as an illustration of which may be cited the case of *Saint* v. *Pilley* (*m*), in which it was held, that the surrender of a term by a trustee in bankruptcy could not defeat the right of one who had previously purchased the fixtures, but had, without laches, allowed them to remain upon the premises. And where a man parts with land, knowing that it is intended to erect substantial buildings upon it, he will not be allowed

(*i*) *Per* Maule, J., *Blyth* v. *Dennett*, 13 C. B. 181; *per* Crompton, J., *Ward* v. *Day*, 4 B. & S. 353; S. C. affirmed in error, 5 B. & S. 359; and see *per* Lord Brougham, C., *Clayton* v. *A.-G.*, 1 Coop. (Rep. *temp.* Cottenham), 124.

(*k*) 1 Swanst. 427, note.

(*l*) *Reg.* v. *Ellis*, 4 Exch. 652, 661; S. C. affirmed in error, 6 Exch. 921.

(*m*) L. R. 10 Ex. 137, 44 L. J. Ex. 33.

afterwards to use his adjoining land so as to injure or interfere with those buildings (*n*).

Further, if a stranger begins to build on land, supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of Equity will not afterwards assist the real owner asserting his title to the land (*o*).

The principle is further to be discovered as underlying the doctrine which is known in England as that of *election*, in Scotland as *approbate* and *reprobate* (*p*), which is thus explained by Lord *Cairns*: "Where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument, without at the same time conforming to all its provisions, and renouncing every right inconsistent with them" (*q*). Election.

Lastly, where a witness in a court of justice makes contradictory statements relative to the same transaction, the rule applicable in determining the degree of credibility to which he may be entitled obviously is, *allegans contraria non est audiendus*.

(*n*) *Siddons* v. *Short*, 2 C. P. D. 572; 46 L. J. C. P. 795.

(*o*) *Ramsden* v. *Dyson*, L. R. 1 H. L. 129, 141, 168.

(*p*) *Codrington* v. *Codrington*, L. R. 7 H. L. 854 at p. 861; 45 L. J. Ch. 660.

(*q*) As instances of which doctrine see *Talbot* v. *Earl of Radnor*, 3 My. & K. 252. *Messenger* v. *Andrews*, 4 Russ. 478. *Cooper* v. *Cooper*, L. R. 7 H. L. 53; for "Approbate and Reprobate" v. *Kerr* v. *Wauchope*, 1 Bligh, 121.

OMNE MAJUS CONTINET IN SE MINUS. (5 *Rep.* 115.)—*The greater contains the less* (*r*).

Tender of larger sum than due.

On this principle, if a man tender more than he ought to pay, it is good; and the other party ought to accept so much of the sum tendered as is due to him (*s*). But a tender by a debtor of a bank-note of a larger amount than the sum due, and out of which he requires change, is not a good tender, for the creditor may be unable to take what is due and return the difference (*t*); though if the creditor knows the amount due to him, and is offered a larger sum, and, without any objection on the ground of change, makes quite a collateral objection, that will be a good tender (*u*). Where, however, a party has separate demands for unequal sums against several persons, an offer of one sum for the debts of all, not distinguishing the claims against each, is not a valid tender, and will not support a plea by one of the debtors, that *his* debt was tendered (*x*).

(*r*) Finch, Law, 21; D. 50. 17. 113. 110, pr.

(*s*) 3rd Resolution in *Wade's case*, 5 Rep. 115; cited arg. *Rivers* v. *Griffiths*, 5 B. & Ald. 631, and recognized *Dean* v. *James*, 4 B. & Ad. 546; *Astley* v. *Reynolds*, 2 Stra. 916; Wing. Max. p. 208.

A demand of a larger sum than is due may be good as a demand of the lesser sum, *Carr* v. *Martinson*, 1 E. & E. 456.

See, as another instance of the maxim, *supra*, *Rylands* v. *Kreitman*, 19 C. B. N. S. 351.

(*t*) *Betterbee* v. *Davis*, 3 Camp. 70, cited 4 B. & Ad. 548; *Robinson* v. *Cook*, 6 Taunt. 336; *Blow* v. *Russell*, 1 C. & P. 365.

(*u*) *Per* Lord Abinger, C. B., *Bevans* v. *Rees*, 5 M. & W. 308; *Black* v. *Smith*, Peake, N. P. C. 88; *Saunders* v. *Graham*, Gow, R. 121; *Douglas* v. *Patrick*, 3 T. R. 683. See *Hardingham* v. *Allen*, 5 C. B. 793; *Ex parte Danks*, 2 De G. M. & G. 936.

(*x*) *Strong* v. *Harvey*, 3 Bing. 304. See also *Douglas* v. *Patrick*, *supra*. Tender of part of an entire debt is a bad tender: *Dixon* v. *Clark*, 5 C. B. 365; *Searles* v. *Sadgrave*, 5 E. & B. 639. Nor is a tender qualified or clogged with a condition good,

The maxim admits of familiar and obvious illustration in the power which a tenant in fee-simple possesses over the estate held in fee; for he may either grant to another the whole of such estate, or charge it in any manner he thinks fit, or he may create out of it any less estate or interest; and to the estate or interest thus granted he may annex such conditions, provided they be not repugnant to the rules of law, as he pleases (*y*). In like manner, a man having a power may do less than such power enables him to do; he may, for instance, lease for fourteen years, under a power to lease for twenty-one years (*z*); or, if he have a licence or authority to do any number of acts for his own benefit, he may do some of them and need not do all (*a*). In these cases, the rule of the civil law applies—*Non debet cui plus licet quod minus est non licere* (*b*); or, as it is usually found expressed in our books, *cui licet quod majus non debet quod minus est non licere* (*c*)—he who has authority to do the more important act shall not be debarred from doing that of less importance; a doctrine founded on common sense, and of very general importance and application, not only with reference to the law of real property, but to that likewise of principal and agent, as we shall hereafter see. On this principle, moreover, if there be a custom within any manor that copyhold lands may be

Finch v. *Miller*, 5 C. B. 428; *Bowen* v. *Owen*, 11 Q. B. 130.

(*y*) 1 Prest. Abstr. Tit. 316, 377.

(*z*) *Isherwood* v. *Oldknow*, 3 M. & S. 382. See an instance of syllogistic reasoning founded on the above maxim, *Johnstone* v. *Sutton*, in error, 1 T. R. 519.

(*a*) *Per* Lord Ellenborough, C.J., *Isherwood* v. *Oldknow*, 3 M. & S. 392.

(*b*) D. 50, 17, 21.

(*c*) 4 Rep. 23; also *majus dignum trahit ad se minus dignum;* Co. Litt. 355 b; 2 Inst. 307; Noy, Max. 9th ed. p. 26; Finch, Law, 22.

granted in fee-simple, by the same custom they are grantable to one and the heirs of his body for life, for years, or in tail (*d*). So, if there be a custom that copyhold lands may be granted for life, by the same custom they may be granted *durante viduitate*, but not *è converso*, because an estate during widowhood is less than an estate for life (*e*).

Merger.

The doctrine of merger may also be specified in illustration of the maxim now before us, for "when a less estate and a greater estate, limited subsequent to it, coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated; or in the law phraseology is said to be merged, that is sunk or drowned in the greater; or to express the same thing in other words, the greater estate is accelerated so as to become at once an estate in possession" (*f*).

Extension of principle.

Further, it is laid down as generally true, that, where more is done than ought to be done, that portion for which there was authority shall stand, and the act shall be void *quoad* the excess only (*g*), *quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum est* (*h*): as in the instance of a power above referred to, if a man do more than he is authorized to do under the power, it shall be good to the extent of his power. Thus, if he have power to lease for ten years, and he lease for twenty years, the lease for the twenty years shall in equity be good for ten years of the twenty (*i*).

So, if the grantor of land is entitled to certain shares

(*d*) 4 Rep. 23; Wing. Max. p. 206.

(*e*) Co. Copyholder, s. 33; Noy, Max. 9th ed. p. 25. See another example, 9 Rep. 48.

(*f*) 2 Black. Com. 326-7.

(*g*) Noy, Max. 9th ed. p. 25.

(*h*) 5 Rep. 115.

(*i*) See *Bartlett* v. *Rendle*, 3 M. & S. 99; *Doe* d. *Williams* v. *Matthews*, 5 B. & Ad. 298.

only of the land granted; and if the grant import to pass more shares than the grantor has, it will nevertheless pass those shares of which he is the owner (*k*). Where also there is a custom that a man shall not devise any greater estate than for life, a devise in fee will be a good devise for life, if the devisee will claim it as such (*l*).

Lastly, in criminal law the principle above exemplified sometimes applies, *ex. gr.*, on an indictment charging a misdemeanor the jury may find the prisoner guilty of any lesser misdemeanor which is necessarily included in the offence as charged (*m*). But it is only by virtue of the statute 14 & 15 Vict. c. 100, s. 9, that where a person has been indicted for a crime, a jury may find him guilty of an attempt to commit the same crime.

QUOD AB INITIO NON VALET IN TRACTU TEMPORIS NON CONVALESCIT. (*Noy, Max. 9th ed. p.* 16, *Dig.* 50, 17, 29, 210.)—*That which was originally void, does not by lapse of time become valid.*

Importance of rule in practice and pleading.

The above rule is one of very general importance in practice, in pleading, and in the application of legal principles to the occurrences of life (*n*).

(*k*) 3 Prest. Abstr. Tit. 35.

(*l*) Gr. & Rud. of Law, p. 242.

(*m*) *Reg.* v. *Taylor*, L. R. 1 C. C. 194, 196. See *Reg.* v. *Hodgkiss*, *Id.* 212.

(*n*) See instances of the application of this rule in the case of marriage with a deceased wife's sister, *Fenton* v. *Livingstone*, 3 Macq. Sc. App. Cas. 497, 555; of the surrender of a copyhold, *Doe* d. *Tofield* v. *Tofield*, 11 East, 246; of a parish certificate, *R.* v. *Upton Gray*, 10 B. & C. 807; *R.* v. *Whitchurch*, 7 B. & C. 573; of an order of removal, *R.* v. *Chilvers-coton*, 8 T. R. 178.

General application.

Instances in which it applies will be found to occur in various parts of this work, particularly in that which treats of the law of contracts. The following cases have here been selected, in order to give a general view of its application in different and distinct branches of the law.

Lease.

If a bishop makes a lease of lands for four lives, which is contrary to the stat. 13 Eliz. c. 10, s. 3, and one of the lives falls in, and then the bishop dies, yet this lease will not bind his successor, for those things which have a bad beginning cannot be brought to a good end (*o*). So, if a man seised of lands in fee make a lease for twenty-one years, rendering rent to begin presently, and the same day he make a lease to another for the like term, the second lease is void; and even if the first lessee surrender his term to the lessor, or commit any act of forfeiture of his lease, the second lessee shall not have his term, because the lessor at the making of the second lease had nothing in him but the reversion (*p*).

Again, in the case of a lease for years, there is a distinction between a clause by which, on a breach of covenant the lease is made absolutely void, and a clause which merely gives the lessor power to re-enter. In the former case, if the lessor make a legal demand of the rent, and the lessee neglect or refuse to pay, or if the lessee be guilty of any breach of the condition of re-entry, the lease is *void* and absolutely determined, and cannot be set up again by acceptance of rent due after the breach of the condition, or by any other act; but if, on the other hand, the clause be, that for non-payment

(*o*) Noy, Max. 9th ed. p. 16. See *Doe* d. *Brammall* v. *Collinge*, 7 C. B. 939; *Doe* d. *Pennington* v. *Taniere*, 12 Q. B. 998.

(*p*) *Smith* v. *Stapleton*, Plowd. 432 Noy, Max. 9th ed. p. 16.

of the rent it shall be lawful for the lessor to re-enter, the lease is only *voidable*, and may be affirmed by acceptance of rent accrued afterwards, or other act, provided the lessor had notice of the breach of condition at the time; and it is undoubted law that, though an acceptance of rent or other act of waiver may make a voidable lease good, it cannot make valid a deed (*q*) or a lease which was void *ab initio* (*r*).

Where a remainder is limited to A., the son of B., he having no such son, and afterwards a son is born to him, whose name is A., during the continuance of the particular estate, he will not take by this remainder (*s*). Remainds. &c.

So, where uses are raised by a deed which is itself void, as in the instance of the conveyance of a freehold *in futuro*, the uses mentioned in the deed cannot arise (*t*). When the estate to which a warranty is annexed is defeated, the warranty is also defeated (*u*); and when a spiritual corporation to which a church is appropriate is dissolved, the church is disappropriated (*x*).

So, where a living becomes vacant by resignation or canonical deprivation, or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is presumed to be cognizant, the law requires him to give notice thereof to the patron (*y*); otherwise he can

(*q*) See *De Montmorency* v. *Devereux*, 7 Cl. & Fin. 188.

(*r*) *Doe* d. *Bryan* v. *Banks*, 4 B. & Ald. 401; Co. Litt. 215 a; *Jones* v. *Carter*, 15 M. & W. 719.

(*s*) Noy, Max. 9th ed. p. 17; 2 Black. Com. 320-1.

(*t*) Arg. *Goodtitle* v. *Gibbs*, 5 B. & C. 714.

(*u*) Litt. s. 741, and Butler's note, (1); Co. Litt. 389 a; but this may with more propriety be referred to the maxim, *sublato principali tollitur adjunctum*. *Ib.*

(*x*) Noy, Max. 9th ed. p. 20.

(*y*) See *Bishop of Exeter* v. *Marshall*, L. R. 3 H. L. 17; 37 L. J. C. P. 331.

take no advantage by way of lapse; neither in this case shall any lapse accrue to the metropolitan or to the Crown, for the first step or beginning fails—*quod non habet principium non habet finem* (*z*), it being universally true, that neither the archbishop nor the Crown shall ever present by lapse, but where the immediate ordinary might have collated by lapse within the six months, and has exceeded his time (*a*).

Qualification of rule.

Aider by verdict.

An important qualification of the rule expressed by the maxim we have been discussing is effected by the doctrine of aider by verdict. When an averment which is necessary for the support of a pleading is improperly stated, and the verdict on an issue involving that averment is found, if it appears to the Court after verdict, that the issue could not have been determined without proof of the averment, the defective averment, which might have been fatal on demurrer, is cured by the verdict (*b*). It is to be observed that this principle is applicable in criminal as well as in civil proceedings (*c*). Aider by verdict does not, however, extend to a case where a necessary averment is totally omitted (*d*). In such cases the more general rule applies, *debile fundamentum fallit opus* (*e*). A still more marked qualification of the leading maxim is afforded by cases where an act done contrary to the express direction or established practice of the law will not be found to

Further exceptions.

(*z*) Wing. Max. p. 79; Co. Litt. 345 a.

(*a*) 2 Black. Com. 452; Co. Litt. 345 a.

(*b*) *Heyman* v. *Regina*, L. R. 8 Q. B. 102; *per* Blackburn, J. P. 105; and see *Jackson* v. *Pesked*, 1 M. & S. 234; 1 Wms. Saund. 228, 1.

(*c*) *Reg.* v. *Aspinall*, 2 Q. B. D. 48; 45 L. J. M. C. 229.

(*d*) *Per* Brett, J. A., *ibid.* p. 58.

(*e*) Finch, Law, 14, 36; Wing. Max. 113, 114. See, also, the judgment, *Davies* dem. *Lowndes* ten., 8 Scott, N. R. 567, where the above maxim is cited and applied.

invalidate the subsequent proceedings, and where, consequently, *quod fieri non debet factum valet* (*f*).

The Bunwen Iron Company v. *Barnett* (*g*) seems to fall within the class of cases to which the maxim just cited applies. There a certificate of complete registration had been granted by the Registrar of Joint Stock Companies, pursuant to the stat. 7 & 8 Vict. c. 110, s. 7; although the deed of settlement omitted some of the provisions required to be inserted therein: and it was held that a shareholder could not, in answer to an action brought against him for calls, object that the certificate had been granted upon the production of an insufficient deed.

The case of *Reg.* v. *Lord Newborough* (*h*) also well illustrates this exception to the maxim. There the question was as to the payment of special constables by a county treasurer, neither the appointment of the special constables, nor the order for their payment, having been made in accordance with the requirements of the 1 & 2 Wm. 4, c. 41. It was urged in the argument *quod fieri non debet factum valet*, a view which was adopted by *Lush*, J., who decided that, as the order for payment had been acted upon, the account allowed, and the money paid, the proceedings should not be re-opened.

Conformably to the principle on which the foregoing case was decided, the maxim *quod fieri non debet factum valet*, will in general be found strictly to apply wherever

(*f*) Gloss. in 1, 5, Cod. 1. 14. *Pro infectis*: D. 1, 14, 3. Wood, Inst., 25; 5 Rep. 38. As will be seen hereafter, this and the leading maxim have frequent application in the case of contracts. See *McCallan* v. *Mortimer*, 6 M. & W. 53; 7 M. & W. 20, 1 in Exch. Ch.; 9 M. & W. 640.

(*g*) 8 C. B. 406, 433.

(*h*) L. R. 4 Q. B. 585. v. also *per* Blackburn, J., *Winsor* v. *Reg.*, 6 B. & S. 183.

a form has been omitted which ought to have been observed, but of which the omission is *ex post facto* immaterial (*i*). It frequently happens, indeed, that a particular act is directed to be done by one clause of a statute, and that the omission of such act is, by a separate clause, declared immaterial with reference to the validity of proceedings subsequent thereto. In all such cases it is true, that what ought not to have been done is valid when done. Thus, residence in the parish before proclamation is directed by the stat. 26 Geo. 2, c. 33, "For the better preventing of Clandestine Marriages," as a requisite preliminary to the celebration of a marriage by banns; but if this direction, although very material for carrying out the object of that Act, be not complied with, the marriage will nevertheless be valid under the 10th section, for here the legislature has expressly declared, that non-observance of this statutory direction shall, after the marriage has been solemnised, be immaterial (*k*). The applicability of this maxim, in regard to the validity of a marriage irregularly solemnised, was also discussed in *Beamish* v. *Beamish*, which will hereafter more conveniently be noticed (*l*).

Lastly, it is said, that "void things" may nevertheless be "good to some purpose" (*m*); as if A., by indenture, let B. an acre of land in which A. has nothing, and A.

(*i*) *Per* Lord Brougham, 6 Cl. & Fin. 708; arg. 9 Wheaton (U. S.), R. 478. "There is a known distinction between circumstances which are of the *essence* of a thing required to be done by an Act of Parliament, and clauses *merely directory*." *Per* Lord Mansfield, C.J., *R.* v. *Loxdale*, 1 Burr. 447, adopted *per* Tindal, C.J., *Southampton Dock Co.* v. *Richards*, 1 Scott, 239, and cited arg. 7 *Id.* 695.

(*k*) See *per* Lord Brougham, 6 Cl. & Fin. 708 *et seq.*

(*l*) 5 Irish C. L. Rep. 136; S. C., 6 *Id.* 142; 9 H. L. Cas. 274.

(*m*) Finch, Law, 62.

purchase it afterwards, this will be a good lease (*n*); and the reason is, that what, in the first instance, was a lease by estoppel only (*o*), becomes subsequently a lease in interest, and the relation of landlord and tenant will then exist as perfectly as if the lessor had been actually seised of the land at the time when the lease was made (*p*).

ARGUMENTUM AB INCONVENIENTI PLURIMUM VALET IN LEGE. (*Co. Litt.* 66 *a.*)—*An argument drawn from inconvenience is forcible in law* (*q*).

It has been stated, in treating one of the preceding maxims (*r*), that where the law is clearly defined, its strict letter will not be departed from because inconvenience or hardship may result from its strict observance. Nevertheless, in cases where the law is not clear, or where the circumstances give rise to doubt, the Courts will frequently allow their decision to be determined by such considerations (*s*).

Thus, arguments of inconvenience are sometimes of great value upon the question of intention. If there be

(*n*) Noy. Max., 9th ed., *p.* 17, and authorities cited, *Id.* n. (*a*).

(*o*) See *Cuthbertson* v. *Irving*, 4 H. & N. 742, 754; S. C., 6 *Id.* 135; *Duke* v. *Ashby*, 7 *Id.* 600.

(*p*) *Blake* v. *Foster*, 8 T. R. 487; *Stokes* v. *Russell*, 3 T. R. 678; *per* Alderson, B., 6 M. & W. 662; *Webb* v. *Austin*, 8 Scott, N. R. 419; *Pargeter* v. *Harris*, 7 Q. B. 708; Co. Litt. 47 b., 1 Platt on Leases, 53, 54; Bac. Abr. Leases (*o*).

(*q*) Co. Litt. 97, 152 b. As to the argument *ab inconvenienti*, see *per* Sir W. Scott, 1 Dods. 402; *per* Lord Brougham, 6 Cl. & Fin. 671; 1 Mer. 420. *Sheppard* v. *Phillimore*, L. R. 2 P. C. 450, 460.

(*r*) *Omnis innovatio, &c.*

(*s*) *Per* Heath, J., 1 H. Bla. 61; *per* Dallas, C.J., 7 Taunt. 527; 8 *Id.* 762; *per* Holroyd, J., 3 B. & C. 131; Judgm., *Doe* v. *Acklam*, 2 B. & C. 793.

in any deed or instrument equivocal expressions, and great inconvenience must necessarily follow from one construction, it is strong to show that such construction is not according to the true intention of the grantor; but where there is no equivocal expression in the instrument, and the words used admit only of one meaning, arguments of inconvenience prove only want of foresight in the grantor. This reasoning was applied in the case of *Glyn, Mills, & Co.* v. *The East and West India Dock Co.*, in which the meaning of the expression in bills of lading, "the one being accomplished, the other to stand void," was discussed(*t*). But because a man has been wanting in foresight, the courts of justice cannot make a new instrument for him: they must act upon the instrument as it is made (*u*); and generally, if there be any doubts what is the law, judges solve such doubts by considering what will be the good or bad effects of their decision; but if the law is clear, inconveniences afford no argument of weight with the judge: the legislature only can remedy them (*x*). And, hence, the doctrine, that *nihil quod est inconveniens est licitum* (*y*), which is frequently advanced by Sir E. Coke, must certainly be received with some qualification, and must be understood to mean, that against the introduction or establishing of a particular rule or precedent inconvenience is a forcible argument (*z*).

(*t*) 7 App. Cas. 591; & see *per* Jessel, M. R., Bottomley's case. 16 Ch. D. at p. 686.

(*u*) *Per* Sir J. Leach, V.-C., *A.-G.* v. *Duke of Marlborough*, 3 Madd. 540; *per* Burrough, J., *Deane* v. *Clayton*, 7 Taunt. 496; *per* Best, C.J., *Fletcher* v. *Lord Sondes*, 3 Bing. 590.

(*x*) *Per* Lord Northington, C., *Pike* v. *Hoare*, 2 Eden, 184; *per* Abbott, C.J., 3 B. & C. 471. See Vaughan, R. 37, 38.

(*y*) Co. Litt. 66 a.; cited *per* Pollock, C.B., 4 H. L. Cas. 145, and *per* Lord Truro, *Id.* 195.

(*z*) Ram. Science of Legal Judgment, 57.

Public inconvenience.

This argument *ab inconvenienti*, moreover, is, under many circumstances, valid to this extent, that the law will sooner suffer a private mischief than a public inconvenience,—a principle which we have already had occasion to consider in its general application. It is better to suffer a mischief which is peculiar to one, than an inconvenience which may prejudice many (*a*).

Argument, how applied in interpreting statutes.

Lastly, in construing an Act of Parliament, the same rule applies. If the words used by the legislature, in framing any particular clause, have a necessary meaning, it will be the duty of the Court to construe the clause accordingly, whatever may be the inconvenience of such a course (*b*). Where a statute is imperative no reasoning *ab inconvenienti* should prevail. But, unless it is very clear that violence would be done to the language of the Act by adopting any other construction, any great inconvenience which might result from that suggested, may certainly afford fair ground for supposing that it could not be what was contemplated by the legislature, and will warrant the Court in looking for some other interpretation (*c*).

Although, according to Lord Bacon (*d*), judges ought above all things to remember the conclusion of the Roman Twelve Tables, *Salus populi suprema lex*, and that laws, unless they be in order to that end, are but things captious and not well inspired, he reminds them elsewhere that their function is to interpret, and not make the law.

(*a*) Co. Litt. 97 b. 152 b. ; Hobart, 224 ; *salus populi*, &c., *antea*.

(*b*) *Per* Erle, J., *Wansey*, app., *Perkins*, resp., 8 Sc. N. R. 969 ; *per* Parke, J., *Mirehouse* v. *Rennell*, 1 Cl. & Fin. 546. Wilberforce on Stat. Law, Chap. 3.

(*c*) Judgm., *Doe* d. *Governors of Bristol Hospital* v. *Norton*, 11 M. & W. 928 ; Judgm., *Turner* v. *Sheffield R. C.*, 10 M. & W. 434.

(*d*) Essay "Of Judicature," see *per* Pollock, C.B., 4 H. L. Cas. 152.

CHAPTER V.

FUNDAMENTAL LEGAL PRINCIPLES.

MANY of the principles set forth and illustrated in this chapter are of such general application that they may be considered as exhibiting the very grounds or foundations on which the legal science rests. To these established rules and maxims the remark of Sir *W. Blackstone* (Com., 21st ed., vol. i., p. 68) is peculiarly applicable:—Their authority "rests entirely upon general reception and usage, and the only method of proving that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it." It would, indeed, be highly interesting and useful to trace from a remote period, and through successive ages, the gradual development of these principles, to observe their primitive and more obvious meaning, and to show in what manner and under what circumstances they have been applied by the "living oracles" of the law to meet the increasing exigencies of society, and those complicated facts which are the result of commerce, civilization, and refinement. Such an inquiry would, however, be too extensive to be compatible with the plan of this work; our object, therefore, in the following pages, is limited to exhibiting a series of the elementary and fundamental rules of law, accompanied by a few observations, when necessary, with occasional references to the civil law, and a sufficient

number of cases to exemplify the meaning and qualifications of the maxims cited.

These will be found to comprise the following important principles: that where there is a right there is a remedy, that the law looks not at the remote, but at the immediate cause of damage—that the act of God shall not, by the instrumentality of the law, work an injury—that damages shall not in general be recovered for the non-performance of that which was impossible to be done—that ignorance of the law does not, although ignorance of facts does, afford an excuse—that a party shall not convert that which was done by himself, or with his assent, into a wrong—that a man shall not take advantage of his own tortious act—that the abuse of an authority given by law shall, in some cases, have a retrospective operation in regard to the liability of the party abusing it—that the intention, not the act, is regarded by the law,—and that a man shall not be twice vexed in respect of the same cause of action.

UBI JUS IBI REMEDIUM. (*See* 1 *T. R.* 512.)—*There is no wrong without a remedy* (*a*).

Jus and *remedium* defined.

Jus, in the sense in which it is here used, signifies "the legal authority to do or to demand something" (*b*).

Remedium may be defined to be the right of action, or the means given by law for the recovery or assertion of a right, and, according to the above elementary maxim,

(*a*) *Johnstone* v. *Sutton* (in error), 1 T. R. 512; Co. Litt. 197, b. See also Lord Camden's judgment in *Entick* v. *Carrington*, 19 How. St. Trials, 1066.

(*b*) Mackeld. Civ. Law, 6. For a general definition of the word "jus" see Wharton's Law Lexicon, 6th ed. 515.

whenever the law gives anything, it gives a remedy for the same: *lex semper dabit remedium* (*c*). If a man has a right, he must, it has been observed in a celebrated case, have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal (*d*).

It appears, then, that *remedium*, although sometimes used as synonymous with *actio*, has, in the maxim which we now propose to consider, a more extended signification than the word "action" in its modern sense. An "*action*" is, in fact, one peculiar mode pointed out by the law for enforcing a remedy, or for prosecuting a claim or demand, in a court of justice—*action n'est auter chose que loyall demande de son droit* (*e*), an action is merely the legitimate mode of enforcing a right, whereas *remedium* must here be understood to signify rather the right of action, or *jus persequendi in judicio quod sibi debetur* (*f*), which is in terms the definition of the word *actio* in the Roman law (*g*).

The maxim *ubi jus ibi remedium* has been considered

(*c*) Jacob, Law Dict., title "*Remedy*:" Bac. Abr., "*Actions in General*," (B). The reader is referred for general information as to the nature of legal rights and remedies to Broom's Com., 4th ed., Bk. i. chap. 3. "Upon principle, wherever the common law imposes a duty, and no other remedy can be shown to exist, or only one which has become obsolete or inoperative, the Court of Queen's Bench will interfere by mandamus." Judgm., 12 A. & E. 266. See, also, *Gosling* v. *Veley*, 7 Q. B. 451.

(*d*) *Per* Holt, C. J., *Ashby* v. *White*, 2 Lord Raym. 953; *per* Willes, C. J., *Winsmore* v. *Greenbank*, Willes, 577; Vaugh. R. 47, 253.

(*e*) Co. Litt. 285, a.; Wharton's Law Lexicon, 6th ed. 26.

(*f*) I. 4. 6. pr.

(*g*) See Phillimore, Introd. to Rom. L., 61.

so valuable, that it gave occasion to the first invention of that form of action called an action on the case; for the statute of Westminster 2 (13 Edw. 1, c. 24), which is only in affirmance of the common law on this subject, and was passed to quicken the diligence of the clerks in the Chancery, who were too much attached to ancient precedents, enacts, that, "whensoever from thenceforth a writ shall be found in the Chancery, and in a like case, falling under the same right and requiring like remedy, no precedent of a writ can be produced, the clerks in Chancery shall agree in forming a new one; and if they cannot agree, it shall be adjourned till the next Parliament, where a writ shall be framed by consent of the learned in the law, lest it happen for the future that the Court of our Lord the King be deficient in doing justice to the suitors."

Statute 13 Edw. 1, c.24. Action on the case.

The principle adopted by courts of law accordingly is, that the novelty of the particular complaint alleged in an action on the case is no objection, provided that an injury cognisable by law be shown to have been inflicted on the plaintiff (*h*); in which case, although there be no precedent, the common law will judge according to the law of nature and the public good (*i*).

It is, however, important to observe this distinction, that, where cases are new in principle, it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the sole question is upon the application of a principle recognised in the law to such new case, it will be just as competent to courts of justice to apply the

Distinction to be observed.

(*h*) *Per* Pratt, C. J., *Chapman* v. *Pickersgill*, 2 Wils. 146; *Novello* v. *Sudlow*, 12 C. B. 177, 190; *et vide per* Coleridge, J., *Gosling* v. *Veley*, 4 H. L. Cas. 768; *Catchpole* v. *Ambergate, &c., R. C.* 1 E. & B. 111.

(*i*) Jenk. Cent. 117.

principle to any case that may arise two centuries hence as it was two centuries ago (*k*).

Ashby v. *White.*

In accordance with the spirit of the maxim, *ubi jus ibi remedium*, it was held, in a case usually cited to illustrate it, that a man who has a right to vote at an election for members of Parliament, may maintain an action against the returning officer for *maliciously* (*l*) refusing to admit his vote, though his right was never determined in Parliament, and though the persons for whom he offered to vote were elected (*m*); and in answer to the argument, that there was no precedent for such an action, and that establishing such a precedent would lead to multiplicity of actions, Lord *Holt* observed that if men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense (*n*).

Principle deducible therefrom.

It is true, therefore, that, in trespass and for torts generally, new actions may be brought as often as new injuries and wrongs are repeated (*o*). And every statute

(*k*) *Per* Ashhurst, J., *Pasley* v. *Freeman*, 3 T. R. 63; *per* Park, J., 7 Taunt. 515; *Fletcher* v. *Lord Sondes*, 3 Bing. 550.

(*l*) Proof of malice is essential to the maintenance of such an action. *Tozer* v. *Child*, 7 E. & B. 377; S. C., 6 *Id.* 289, citing Lord Holt's judgment in *Ashby* v. *White* (ed. 1837).

Where damage is occasioned by a wrongful act, *i.e.*, an act which the law esteems an injury, malice is *not* a necessary ingredient in the right of action. Judgm., *Rogers* v. *Dutt*, 13 Moo. P. C. C. 236.

(*m*) *Ashby* v. *White*, 2 Ld. Raym. 338; cited *Stockdale* v. *Hansard*, 9 A. & E. 135, and in *Rochdale Canal Co.* v. *King*, 14 Q. B. 122, 138. In connection with *Ashby* v. *White*, see also *Pryce* v. *Belcher*, 3 C. B. 58; S. C., 4 *Id.* 866 (where the maxim above illustrated was much considered), and *Tozer* v. *Child*, *supra*; *et vide Jenkins* v. *Waldron*, 11 Johns. (U. S.), R. 120.

(*n*) 2 Ld. Raym. 955; *Millar* v. *Taylor*, 4 Burr. 2344.

(*o*) *Hambleton* v. *Veere*, 2 Wms. Saund. 171, b (1); cited *per* Lord Denman, C. 7., *Hodsoll* v. *Stallebrass*, 11 A. & E. 306. In an action for damage to the plaintiff's lands and buildings by the removal of lateral support it has been held that prospective as well as the actual damage must be recovered once and

made against an injury, mischief, or grievance, impliedly gives a remedy, for the party injured may, if no remedy be expressly given, have an action upon the statute; and if a penalty be given by statute, but no action for the recovery thereof be named, an action of debt will lie for the penalty (*p*), and an action can also be maintained if the remedy given by the statute does not cover the whole right (*q*). So, where a statute requires an act to be done for the benefit of another, or forbids the doing of an act which may be to his injury, though no action be given in express terms by the statute for the omission or commission, the general rule of law is, that the party injured shall have an action (*r*); for, "where a statute gives a right, there, although in express terms it has not given a remedy, the remedy which by law is properly applicable to that right follows as an incident" (*s*). And, in like manner, when a person has an important public duty to perform, he is bound to perform that duty, and if he neglects or refuses so to do, and an individual in consequence sustains injury, that may lay the foundation for an action to recover damages by way of compensation for the injury that he has so sustained (*t*).

Where, however, the Legislature has imposed a statutory

for all. *Lamb* v. *Walker*, 3 Q. B. D. 389; 45 L. J. Q. B. 451; 38 L. T. 643.

(*p*) 2 Dwarr. Stats. 677.

(*q*) *Shepherd* v. *Hills*, 11 Exch. 55, explained *per* Williams, J., in *St. Pancras* v. *Batterbury*, 2 C. B. N. S. 477 at p. 487.

(*r*) *Ashby* v. *White*, *supra*, cited arg. 9 Cl. & Fin. 274; *Hilcoat* v. *Archbishop of Canterbury*, 10 C. B. 327: *Caledonian R. C.* v. *Cort*, 3 Macq. Sc. App. Cas. 833.

(*s*) See *per* Maule, J., *Braithwaite* v. *Skinner*, 5 M. & W. 327; citing *per* Holt, C. J., *Ewer* v. *Jones*, Salk. 415: S. C., 2 Ld. Raym. 937; *per* Willes, J., *Wolverhampton New Waterworks Co.* v. *Hawkesford*, 6 C. B. N. S. 356.

(*t*) *Per* Lord Lyndhurst, C., 9 Cl. & Fin. 279; citing *Sutton* v. *Johnstone*, 1 T. R. 493; *Bartlett* v. *Crozier*, 15 Johns. (U. S.), R. 254, 255.

duty for a purpose altogether foreign to any individua interests there, a breach of that duty causing loss to an individual will not entitle the injured party to maintain an action in respect of it (*u*).

Damnum absque injuriâ.

There is, however, a class of cases, from which it is important to distinguish those above referred to, in which a damage is sustained by the plaintiff, but a damage not occasioned by anything which the law esteems an injury. This kind of damage is termed in law *damnum absque injuriâ* (*x*), and for it no action can be maintained (*y*).

For instance, if a person build a house on the edge of his land, or by alterations in an existing house increase the lateral pressure, and the proprietor of the adjoining land after twenty years have elapsed dig so near that the building falls down or is injured, an action will lie, provided the enjoyment of support to the building from the adjacent land has been open, peaceable, and continuous.

(*u*) *Gorris* v. *Scott*, L. R. 9 Ex. 125 ; 43 L. J. Ex. 92 ; 30 L. T. 431.

(*x*) As to the distinction between *damnum* and *injuriâ*, see *Hall* v. *Mayor of Bristol*, L. R. 2 C. P. 322 ; *Smith* v. *Thackerah*, L. R. 1 C. P. 564.

(*y*) Broom's Com., 4th ed. 75 *et seq.* ; *Cooke* v. *Waring*, 2 H. & C. 332.

"In this country we do not recognise the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger. The right to the exclusive use of a name in connection with a trade or business is familiar to our law ; and any person using that name after a relative right of this description has been acquired by another, is considered to have been guilty of a fraud, or at least of an invasion of another's right, and renders himself liable to an action, or he may be restrained from the use of the name by injunction. But the mere assumption of a name which is the patronymic of a family by a stranger who had never before been called by that name, whatever cause of annoyance it may be to the family, is a grievance for which our law affords no redress." *Per* Sir R. Phillimore, *Du Boulay* v. *Du Boulay*, L. R. 2 P. C. 441-2.

The plaintiff has thereby acquired an absolute right to support, and to infringe that right is an injury (*z*). But if the owner of land adjoining a newly-built house, within twenty years after its erection, dig in a similar manner, and produce similar results, in this case, though there is damage, yet, as there is no right to the support, no injury is in legal contemplation committed by withdrawing it, and consequently no action will be maintainable, unless the weight of the house did not contribute to the subsidence (*a*). The cases *infra* (*b*) are worthy of perusal, with reference not merely to the proposition just stated, but to the right of the surface owner under various and dissimilar circumstances to the support of the subjacent strata.

Further, it often happens, in the ordinary proceedings of life, that a man may *lawfully* use his own property so as to cause damage to his neighbour, which is not *inju-*

(*z*) *Stansell* v. *Jollard*, Selw. N. P. 10th ed. 435 ; *Hide* v. *Thornborough*, 2 Car. & K. 350 ; *Dodd* v. *Holme*, 1 A. & E. 493 ; *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503 ; S. C., E. B. & E. 422 ; *Smith* v. *Thackerah*, L. R. 1 C. P. 564 ; *Angus* v. *Dalton*, L. R. 3 Q. B. D. 85 ; 4 Q. B. D. 162 ; 6 Ap. Cases, 740 ; 47 L. J. Q. B. 163 ; 48 L. J. Q. B. 225 ; 38 L. T. 510 ; 40 L. T. 605.

(*a*) *Brown* v. *Robins*, 4 H. & N. 186 ; *Stroyan* v. *Knowles*, 6 H. & N. 454 ; *Angus* v. *Dalton*, *supra*.

(*b*) *Wyatt* v. *Harrison*, 3 B. & Ad. 876 ; *Gayford* v. *Nicholls*, 9 Exch. 702 ; *Hilton* v. *Whitehead*, 12 Q. B. 734 ; *Rowbotham* v. *Wilson*, 8 H. L. Cas. 348, cited *Murchie* v. *Black*, 19 C. B. N. S. 208 ; *Humphries* v. *Brogden*, 12 Q. B. 739 ; as to which see *Solomon* v. *Vintners' Co.*, 4 H. & N. 598-9, cited *per* Wood, V.-C., *Hunt* v. *Peake*, 29 L. J. Chanc. 785 ; *North-Eastern R. C.* v. *Elliot*, 10 H. L. Cas. 333 ; *Allaway* v. *Wagstaff*, 4 H. & N. 681 ; *Rogers* v. *Taylor*, 2 H. & N. 828, 834 ; *Brown* v. *Robins*, 4 H. & N. 186 ; *Smart* v. *Morton*, 5 E. & B. 30 ; *Richards* v. *Rose*, 9 Exch. 218 ; *Smith* v. *Kenrick*, 7 C. B. 515 ; *Haines* v. *Roberts*, 6 E. & B. 625, 643 ; *Fletcher* v. *Great Western R. C.*, 4 H. & N. 242 ; approved in *Great Western R. C.* v. *Bennett*, L. R. 2 H. L. 27 ; Judgm., *Keyse* v. *Powell*, 2 E. & B. 144 ; *Caledonian R. C.* v. *Sprot*, 2 Macq. Sc. App. Cas. 449 ; *Richards* v. *Harper*, L. R. 1 Ex. 199 ; *Popplewell* v. *Hodkinson*, L. R. 4 Ex. 248.

riosum (*c*); or he may, whilst pursuing the reasonable exercise of an established right (*d*), casually cause an injury, which the law will regard as a misfortune merely, and for which the party from whose act it proceeds will not be liable. Thus, where certain mineral workings had caused a subsidence of the surface soil and a consequent fall of rain into an adjacent coal field, it was held no action could be maintained for the injury done to the coal field by the influx of water (*e*).

In cases of this nature a loss or damage is indeed sustained by the plaintiff, but no action will lie because the act complained of is not an infringement of any legal right (*f*), and results from an act done by another free and responsible being which is neither unjust nor illegal (*g*). Thus, the establishment of a rival school, which draws away the scholars from a school previously established, is illustrative of such a loss (*h*). So, a man may lawfully build a wall on his own ground in such a manner as to obstruct the lights of his neighbour, who may not have acquired a right to them by grant or adverse user. He may obstruct the prospect from his neighbour's house (*i*). He may build a mill near the mill of

(*c*) *Rogers* v. *Dutt*, 13 Moo. P. C. C. 209, 237, 241, well illustrates the above proposition.

(*d*) *The Eleanor*, 2 Wheaton (U.S.), R. 358; *Panton* v. *Holland*, 17 Johns. (U. S.), R. 100.

(*e*) *Wilson* v. *Waddell*, 2 App. Cas. 95; 35 L. T. 639. See also *Hopkins* v. *G. N. R. Co.*, 2 Q. B. D. 224; 46 L. J. Q. B. 265; 36 L. T. 898; where the Court of Appeal held that the owner of a ferry could not maintain an action for loss of traffic caused by the erection by the company of a bridge over the river.

(*f*) *Barker* v. *Green*, 2 Bing. 317.

(*g*) See *Kennet and Avon Navigation Co.* v. *Witherington*, 18 Q. B. 531; *Laing* v. *Whalley*, 3 H. & N. 675, 901; S. C., 2 *Id.* 476; with which compare *Hodgkinson* v. *Ennor*, 4 B. & S. 229.

(*h*) Bell, Dict. and Dig. of Scotch Law, 252; Bac. Abr., "Actions in General" (B).

(*i*) See *Re Penny*, 7 E. & B. 660, 671.

his neighbour, to the grievous damage of the latter by loss of custom (*k*), and so increase the height of his own premises as to obstruct the access of air to his neighbour's chimneys (*l*). He may, by digging in his own land, intercept or drain off the water collected from underground springs in his neighbour's well. In these and similar cases, the inconvenience caused to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action (*m*). But a distinction must be observed between cases where the water has percolated or gravitated through the adjacent land, unconfined in any channel, and where flowing water passing along a well-defined channel has been diverted; in the latter case a landowner will be restrained if he by any acts on his own land causes the stream to be diverted from its original bed (*n*).

Although it may seem to be a hardship upon the party injured to be without a remedy, by that consideration courts of justice ought not to be influenced. Hard cases, it has been already observed, are apt to introduce bad law (*o*).

(*k*) As to liability for obstructing the current of air to a windmill, see *Webb* v. *Bird*, 10 C. B. N. S. 268.

(*l*) *Bryant* v. *Lefever*, 4 C. P. D. 172; 48 L. J. Ch. 380; 40 L. T. 579.

(*m*) *Acton* v. *Blundell*, 12 M. & W. 341, 354; cited judgm. *Dickinson* v. *Grand Junction Canal Co.*, 7 Exch. 300; S. C., 15 Beav. 260; and in *Smith* v. *Kenrick*, 7 C. B. 566, and commented on *per* Coleridge, J., *diss.*, *Chasemore* v. *Richards*, 2 H. & N. 190 *et seq.*; S. C., 7 H. L. Cas. 349; *Baird* v. *Williamson*, 15 C. B. N. S. 376; *per* Bramwell, B., *Ibbotson* v. *Peat*, 3 H. & C. 647, 650; *per* Pollock, C. B., *Dudden* v. *Guardians of Clutton Union*, 1 H. & N. 630. See *Rawstron* v. *Taylor*, 11 Exch. 369; *Broadbent* v. *Ramsbotham*, *Id.* 602; *Beeston* v. *Weate*, 5 E. & B. 986; *Wardle* v. *Brocklehurst*, 1 E. & E. 1058.

(*n*) *Grand Junction Canal Co.* v. *Shugar*, L. R. 6 Ch. App. 483; 24 L. T. 402.

(*o*) *Ante*, p. 150. *Per* Lord St. Leonards, 7 H. L. Cas. 93; *per* Lord Campbell, *Id.* 628; *per* Rolfe, B.,

Wrong party served by mistake.

Again, where process is served by mistake on a wrong person and all the proceedings in the action are taken against him, the defendant so wrongfully sued will undoubtedly have a good defence to the action, and will consequently recover his costs; but if it be asked what further remedy he has for the inconvenience and trouble he has been put to, the answer is, that, in point of law, if the proceedings have been adopted purely through mistake, though injury may have resulted to him, it is *damnum absque injuriâ*, and no action will lie. Indeed, every defendant against whom an action is unnecessarily brought, experiences some injury or inconvenience beyond what the cost will compensate him for (*p*).

Action against witness.

It has been held too that an action does not lie against a man for a statement made by him in the course of a judicial proceeding, even though it be alleged to have been made "falsely and maliciously, and without any reasonable and probable cause" (*q*).

Act authorised by statute.

Again, if the legislature directs or authorises the doing of a particular thing, the doing of it cannot be wrongful; though, if damage thence results, it may be just and proper

10 M. & W. 116. In *Walker* v. *Hatton*, 10 M. & W. 259, Gurney, B., says, "The plaintiff may have been extremely ill-used, but I think he has no remedy."

(*p*) *Per* Rolfe, B., *Davies* v. *Jenkins*, 11 M. & W. 755, 756; *Cotterell* v. *Jones*, 11 C. B. 713; Hobart, 266; *Ewart* v. *Jones*, 14 M. & W. 774; *Yearsley* v. *Heane*, *Id.* 322; recognised judgm. *Phillips* v. *Naylor*, 3 H. & N. 25; S. C., 4 *Id.* 565; *Daniels* v. *Fielding*, 16 M. & W. 200; *De Medina* v. *Grove*, 10 Q. B. 152, 172; *Churchill* v. *Siggers*, 3 E. & B. 929; *Farley* v. *Danks*, 4 E. & B. 493; *Pivaz* v. *Nicholls*, 2 C. B. 501; *Collett* v. *Foster*, 2 H. & N. 356: *Jennings* v. *Florence*, 2 C. B. N. S. 467. See, further, judgm., *Wren* v. *Weild*, L. R. 4 Q. B. 735.

(*q*) *Revis* v. *Smith*, 18 C. B. 126, 143; *acc. Henderson* v. *Broomhead*, 4 H. & N. 569. The class of cases *supra* is adverted to by Cockburn, C. J., *diss.* in *Dawkins* v. *Lord Paulett*, L. R. 5 Q. B. 107. See *Blagrave* v. *Bristol Waterworks Co.*, 1 H. & N. 369.

that compensation should be made for it. And so the owner of a locomotive, which was being lawfully and properly driven along the highway and which was in all respects constructed according to the Locomotive Acts, was held liable to compensate the owner of a stack which had been damaged and burnt by sparks from the engine (*r*). No action lies, however, for what is *damnum sine injuriâ;* the remedy, if any, being to apply for compensation under the provision of the statute legalising what would otherwise be a wrong. And this is so whether the thing be authorised for a public purpose or for private profit. For example, no action will lie against a railway company for erecting a line of railway authorised by its Acts, so long as the directors pursue the authority given them, any more than it would lie against the trustees of a turnpike road for making their road under their Acts; though the one road is made for the profit of the shareholders in the company and the other is not. In either case the act is not wrongful, because it is authorised by the legislature (*s*).

"The rule," accordingly, "is well established that for any act done which is injurious to property, but which an Act of Parliament has authorised to be done, though the consequence of the act is *damnum* to the owner, it ceases to be *injuriâ*, because no action will lie for doing that which the legislature has authorised if it be done without negligence, and provided the act done does not cause needless injury, and reasonable steps are taken to prevent injury (*t*).

To prevent injustice, the legislature sometimes says that

(*r*) *Powell* v. *Fall*, 5 Q. B. D. 597; 49 L. J. Q. B. 428; 43 L. T. 562. See 28 & 29 Vict. c. 83, sec. 12.

(*s*) *Per* Blackburn, J., *Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. L. 112. And see *Hill* v. *Metropolitan Asylum Board*, 4 Q. B. D. 433; 5 App. Cas. 582; 49 L. J. Q. B. 228.

(*t*) *Geddis* v. *Proprietors of Bann Reservoir*, 3 App. Cas. 430.

in lieu of an action the party affected shall have compensation in the manner provided by the Act. Where, however, the particular Act of Parliament does not authorise the wrong, and consequently the action is not taken away, the case is not one for compensation, but the remedy is by action (*u*).

Every injury to right imports damage.

In most of the cases to which we have just been adverting the party aggrieved has no remedy, because no right has, in contemplation of law, been invaded. Every injury, however, to a legal right necessarily imports a damage in the nature of it, though there be no pecuniary loss (*x*). Thus, where a prisoner is in execution on final process, the creditor has a right to the body of his debtor, every hour till the debt is paid; and an escape of the debtor, for ever so short a time, is necessarily a damage to him, and the action for an escape lies (*y*). In like manner, if a banker has received sufficient funds from his customer, he is bound to honour his cheque; and if he make default in doing so he will be liable in substantial damages, if the

(*u*) *Per* Blackburn, J., *Reg.* v. *Darlington Board of Health*, 5 B. & S. 526; S. C., affirmed in error, 6 B. & S. 562; *Cracknell* v. *Mayor, &c., of Thetford*, L. R. 4 C. P. 629; *Coe* v. *Wise*, L. R. 1 Q. B. 711: *Hammersmith and City R. C.* v. *Brand*, L. R. 4 H. L. 171; *Broadbent* v. *Imperial Gas Co.*, 7 H. L. Cas. 600; and cases cited *ante*, p. 4.

(*x*) *Per* Lord Holt, C. J., *Ashby* v. *White*, 2 Lord Raym. 955.

(*y*) *Williams* v. *Mostyn*, 4 M. & W. 153, recognised in *Wylie* v. *Birch*, 4 Q. B. 566, 577; and *Clifton* v. *Hooper*, 6 Q. B. 468; *Lloyd* v. *Harrison*, 6 B. & S. 36; S. C., affirmed in error, L. R. 1 Q. B. 502. See *Macrae* v. *Clarke*, L. R. 1 C. P. 403; *Arden* v. *Goodacre*, 11 C. B. 367, 371; *Hemming* v. *Hole*, 7 C. B. N. S. 487.

The reasoning in the text has no application to the case of not levying on goods, to support an action for which actual damage must be shown; *Hobson* v. *Thelluson*, L. R. 2 Q. B. 642, 651.

An action lies at suit of the tenant against his landlord for an excessive distress without proof of actual damage; *Chandler* v. *Doulton*, 3 H. & C. 553.

customer be a trader, although no actual damage be proved by the customer as a consequence of such default (*z*), and an attorney who compromises a suit contrary to instructions from his client will be liable without proof of special damage (*a*).

Misfeasance and non-feasance.

From the preceding examples it will be inferred, that an injury to a right may consist either in a *misfeasance* or a *nonfeasance;* and it may not be improper here to remark, that there is in fact a large class of cases, in which the foundation of the action lies in a privity of contract between the parties, but in which, nevertheless, the remedy for the breach or non-performance is indifferently either assumpsit or case. Such are actions against attorneys, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render. Actions, also, against common carriers, against shipowners on bills of lading, or against bailees of different descriptions, may often be brought in tort or contract, at the election of the plaintiff. Nor is it true that this election is only given where the plaintiff sues for a *misfeasance* and not for a *nonfeasance*, for the action of case upon tort very frequently occurs where there is a simple

(*z*) *Marzetti* v. *Williams*, 1 B. & Ad. 415, recognised 6 Q. B. 475; *Rolin* v. *Steward*, 14 C. B. 595; *Warwick* v. *Rogers*, 6 Scott, N. R. 1; *Gray* v. *Johnston*, L. R. 3 H. L. 1, 14, where Lord Westbury says, "A banker is bound to honour an order of his customer with respect to the money belonging to that customer which is in the hands of the banker; and it is impossible for the banker to set up a *jus tertii* against the order of the customer, or to refuse to honour his draft, on any other ground than some sufficient one resulting from an act of the customer himself."

As to the duty of a banker towards his customer, see also *Hardy* v. *Veasey*, L. R. 3 Ex. 107; *Prehn* v. *Royal Bank of Liverpool*, L. R. 5 Ex. 92.

(*a*) *Godefroy* v. *Jay*, 7 Bing. 413; *Fray* v. *Voules*, 1 E. & E. 839, 848, 849, recognising *Marzetti* v. *Williams*, *supra*; see *Butler* v. *Knight*, L. R. 2 Ex. 109.

non-performance of the particular contract, as in the ordinary instance of case against shipowners for not safely and securely delivering goods according to the bill of lading; the principle in all such cases being, that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon tort (*b*).

Costs. Action founded on contract or in tort.

By the County Courts Act, 1867, sect. 5, if the plaintiff in an action founded on contract recovers a sum not exceeding £20 he is not entitled to his costs except upon a judge's certificate, and therefore in cases where the action may be framed on the contract or in tort it becomes material in considering the question of costs to determine what is the foundation of the action, and it appears that if no right to sue exists independently of the contract, the action though in form *ex delicto*, in substance is an action founded on contract; thus in *Fleming* v. *Manchester and Sheffield Railway Co.* (*c*), where the statement of claim alleged that certain goods had been delivered to the defendants as common carriers to be carried from Sheffield to Dundee, and that the defendants did not safely and securely carry the goods, and not regarding their duty in that behalf carelessly and negligently lost the same, the Court of Appeal held that the real ground of complaint being the breach of the contract to deliver, the action was founded on contract and not in tort.

"An action," however, "will not lie at the suit of A. for

(*b*) Judgm., *Boorman* v. *Brown*, 3 Q. B. 525, 526; S. C., affirmed 11 Cl. & Fin. 1; *Farrant* v. *Barnes*, 11 C. B. N. S. 553 (following *Brass* v. *Maitland*, 6 E. & B. 470), and cases there cited. *Preston* v. *Norfolk, R. C.*, 2 H. & N. 735, 752; *per* Lord Abinger, C. B., *Winterbottom* v. *Wright*, 10 M. & W. 115; *Marzetti* v. *Williams*, 1 B. & Ad. 415, 426.

(*c*) 4 Q. B. D. 81; 39 L. T. 565, distinguishing *Pontifex* v. *Midland Ry. Co.*, 3 Q. B. D. 23; and virtually overruling *Tatton* v. *G. W. R. Co.*, 2 E. & E. 844.

the breach by B. of a duty which B. owes to C." (*d*), because in order to support an action there must either be a contract with the person sued or some relation establishing a duty on the part of the defendant towards the plaintiff (*e*).

Damages when nominal.

Having stated it as generally true, that, when a right has been invaded, an action for damages will lie (*f*), although no damage has been actually sustained, we may observe, that the principle on which many such cases proceed, is, that it is material to the establishment and preservation of the right itself, that its invasion should not pass with impunity; and in these cases, therefore, *nominal* damages only are usually awarded, because the recovery of such damages sufficiently vindicates the plaintiff's right; as, for instance, in trespass *qua. cl. fr.*, which is maintainable for an entry on the land of another, though there be no real damage, because repeated acts of going over the land might be used as evidence of a title to do so, and thereby the right of the plaintiff might be injured; or in an action by a commoner for an injury done to his common, in which action evidence need not be given of the exercise of the right of common by the plaintiff (*g*).

Stream, obstruction —removal, although no damage shown.

And where a riparian owner had built an obstruction out from his bank into the stream, the Court ordered its removal

(*d*) *Per* Willes, J., *Barker* v. *Midland R. C.*, 18 C. B. 59, referring to *Winterbottom* v. *Wright*, 10 M. & W. 109.

(*e*) *Heaven* v. *Pindar*, 9 Q. B. D. 302, overruled, but not on this point, in the Court of Appeal, 11 Q. B. D. 503.

(*f*) This proposition is more fully stated and illustrated in *Blofeld* v. *Payne*, 4 B. & Ad. 410; *Rogers* v. *Nowill*, 5 C. B. 109; *Wells* v. *Watling*, 2 W. Bla. 1233; *Pindar* v. *Wadsworth*, 2 East, 154; *ante*, p. 192.

(*g*) *Per* Taunton, J., 1 B. & Ad. 426; *Wells* v. *Watling*, 2 W. Bla. 1233; 1 Wms. Saunds. 346 a, note: cited *per* Martin, B., and Kelly, C. B., *Harrop* v. *Hirst*, L. R. 4 Ex. 43, 45, 47, which shows the test to be whether the act complained of would if repeated operate in derogation of the right of another; if so, an action will

although no immediate damage could be described or any actual loss predicated to the owner of the opposite bank (*h*).

It is not, indeed, by any means true, as a general proposition, that the actual injury offers in an action *ex delicto*, the proper measure of damages to be given; for instance, my neighbour may take from under my house coal, which I had no means of getting at, and yet I may recover the value, notwithstanding I have sustained no real injury (*i*); and other cases might readily be instanced showing that such an action may be maintainable without evidence being adduced of pecuniary loss or *damnum* to the plaintiff (*k*); as in cases of libel and slander, where the words are actionable *per se*, the jury are at liberty to give substantial damages, although no actual damage be proved (*l*).

Cases in which maxim does not hold.

The maxim, however, *ubi jus ibi remedium*, though generally, is not universally true, and various cases occur

lie at the suit of the person whose right may be affected, without proof of individual or specific damage.

(*h*) *Birkett* v. *Morris*, L. R. 1 H. L. Sch. 47. And see *Siddons* v. *Short*, 2 C. P. D. 572; 46 L. J. C. P. 795, as to when an injunction will be granted where no actual injury has been sustained but is apprehended.

(*i*) See *per* Maule, J., *Clow* v. *Brogden*, 2 Scott, N. R., 315, 316; *per* Lord Denman, C.J., *Taylor* v. *Henniker*, 12 A. & E., 488, 492; which case is overruled by *Tancred* v. *Leyland* (in error), 16 Q. B. 669. *Pontifex* v. *Bignold*, 3 Scott, N. R., 390; *Collingridge* v. *Royal Exchange Ass.*, 3 Q. B. D. 173; 47 L. J. Q. B. 32; 37 L. T. 525.

(*k*) *Embrey* v. *Owen*, 6 Exch. 653; *Dickinson* v. *Grand Junction Canal Co.*, 7 Exch. 282; *Northam* v. *Hurley*, 1 E. & B. 665, recognized in *Whitehead* v. *Parks*, 2 H. & N. 870; *Rolin* v. *Steward*, 14 C. B. 595; *Matthews* v. *Discount Corp.*, L. R. 4 C. P. 228. In reference to the question whether substantial damage must be proved, the wording of a statute *may* be material; *ex. gr.*, see *Rogers* v. *Parker*, 18 C. B. 112; *Medway Navigation Co.* v. *Earl of Romney*, 9 C. B. N. S. 575.

(*l*) *Tripp* v. *Thomas*, 3 B. & C. 427. In slander, if the words are not actionable in themselves, special damage must be shown to support the action. As to what constitutes proof of special damage, see *Riding* v. *Smith*, 1 Ex. D. 91; 45 L. J. Ex. 281; 34 L. T. 500.

Remedy by indictment.

to which it does not apply, or at least in which the remedy cannot be in the shape of a civil action to recover damages. Some of these are cases in which the act done is a grievance to the entire community, no one of whom is injured by it more than another. In such cases, the mode of punishing the wrong-doer is usually by indictment only (*m*); although, if any person has suffered a particular damage beyond that suffered by the public, he may maintain an action in respect thereof; thus, if A. dig a trench across the highway, this is the subject of an indictment, but if B. fall into it and sustain a damage, then the particular damage thus sustained will support an action (*n*); and though particular damage must be shown and established, it is not necessary to prove special damage in its technical sense (*o*), but the particular damage must be direct, and of a substantial character (*p*).

So, in the ordinary case of a nuisance arising from the act or default of a person bound to repair *ratione tenuræ*, an indictment may be sustained for the general injury to the public, and an action on the case for a special and particular injury to an individual (*q*). It is indeed an im-

(*m*) Co. Litt. 56 a; *per* Channell, B., *Harrop* v. *Hirst*, L. R. 4 Ex. 47. See *Reg.* v. *Train*, 2 B. & S. 640.

(*n*) *Per* Holt, C.J., 2 Lord Raym. 955; *Winterbottom* v. *Lord Derby*, L. R. 2 Ex. 316; arg. *Davison* v. *Wilson*, 11 Q. B. 895; *Simmons* v. *Lillystone*, 8 Exch. 431; *Hart* v. *Bassett*, T. Jones, 156; *Chichester* v. *Lethbridge*, Willes, 73; *Rose* v. *Miles*, 4 M. & S. 101; *Rose* v. *Groves*, 6 Scott, N. R., 645, and cases there cited; *Kearns* v. *Cordwainers' Co.*, 6 C. B. N. S. 388, 401; *Dobson* v. *Blackmore*, 9 Q. B. 991.

(*o*) *Rose* v. *Groves*, 5 M. & G. 613.

(*p*) *Benjamin* v. *Storr*, L. R. 9 C. P. 400; 43 L. J. C. P. 162; 30 L. T. 362; *Borough of Bathurst* v. *Macpherson*, 4 App. Cas. 256; 48 L. J. P. C. 61; and see *Mayor, &c., of Lyme Regis* v. *Henley* (in error), 3 B. & Ad. 77; S. C., 2 Cl. & Fin. 331; *Nicholl* v. *Allen*, 1 B. & S. 916, 934, 936. See *R.* v. *Ward*, 4 A. & E. 384.

(*q*) 3 B. & Ad. 93, citing Year Book, 12 Hen. 7, fol. 18; Co. Litt.

portant rule, that the law gives no private remedy for anything but a private wrong; and that, therefore, no action lies for a public or common nuisance; and the reason of this is, that the damage being common to all the subjects of the Crown, no one individual can ascertain his particular proportion of it, or if he could, it would be extremely hard if every subject in the kingdom were allowed to harass the offender with separate actions (*r*). So "where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the party complaining to allege and prove, that the doing of the act prohibited has caused him some special damage, some peculiar injury beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by an infringement of the law. But where the act prohibited is obviously prohibited for the protection of a particular party, there it is not necessary to allege special damage" (*s*).

Statute giving penalty for breach of duty. When the sole compensation recoverable.

Where the statute creating the duty has provided a penalty for its non-performance, it appears that the recovery of the penalty is the sole compensation for a private injury caused by the breach of the duty, provided the penalty is made recoverable only by the party aggrieved (*t*); and it may be stated as a general rule that

56 a; *Rose* v. *Groves*, 6 Scott, N. R., 645, and the cases there cited. See also, as to the liability to repair, *Russell* v. *Men of Devon*, 2 T. R. 667, 671, cited Judg., *M'Kinnon* v. *Penson*, 8 Exch. 327; S. C., affirmed in error, 9 Exch. 609; *Young* v. *Davis*, 2 H. & C. 197, affirming S.C., 7. H. & N. 760.

(*r*) Co. Litt. 56 a.; 1 Chit. Gen. Pr. Law, 10.

(*s*) Judgm., *Chamberlaine* v. *The Chester and Birkenhead R. C.*, 1 Exch. 876-7.

(*t*) *Stevens* v. *Jeacock*, 11 Q. B. 731.

where a statute creates an offence or a duty, and defines particular remedies against the person committing that offence or not performing that duty, *primâ facie* a private individual who is injured can avail himself of the remedies so defined and no others (*w*).

Damage, too remote.

Again, where the damage resulting from the act of another is too remote (*x*), or, in other words, flows not naturally, legally, and with sufficient directness from the alleged injury, the plaintiff will not be entitled to recover (*y*); for instance, the temporary obstruction of a highway, which prevented the free passage of persons along it, and so incidentally interrupted the resort to the complainant's public house, is not, by reason of remoteness, the subject of an action at common law as an individual injury sustained by the plaintiff distinguishing his case from that of the rest of the public, and such interruption of persons who would have resorted to the plaintiff's house but for the obstruction of the highway, is a consequential injury too remote to be within the

(*w*) *Atkinson* v. *The Newcastle and Gateshead Waterworks Co.*, 2 Ex. D. 441; 46 L. J. Exch. 775; 36 L. T. 761; in C. A. L. R. 6 Ex. 404; questioning *Couch* v. *Steel*, 3 E. & B. 402; *Brain* v. *Thomas*, 50 L. J. Q. B. 662.

(*x*) Com. Dig., "*Action upon the case for Defamation*" (F. 21). See *Fitzjohn* v. *Mackinder*, 9 C. B. N. S. 505; S. C. 8 *Id.* 78; *Barber* v. *Lesiter*, 7 *Id.* 175; *Steward* v. *Gromett*, *Id.* 191; *Walker* v. *Goe*, 4 H. & N. 350; 3 *Id.* 395; *Assop* v. *Yates*, 2 H. & N. 768; *Hoey* v. *Felton*, 11 C. B. N. S. 142; *Collins* v. *Cave*, 6 H. & N. 131; S. C., 4 *Id.* 225; *Allsop* v. *Allsop*, 5 H. & N. 534, approved in *Lynch* v. *Knight*, 9 H. L. Cas. 577, 592; *Martinez* v. *Gerber*, 7 Scott, N. R., 386; *Dawson* v. *The Sheriffs of London*, 2 Ventr. 84, 89; *Everett* v. *London Assurance*, 19 C. B. N. S. 126; *Burrows* v. *March Gas Co.*, L. R. 5 Ex. 67.

(*y*) *Per* Patteson, J., *Kelly* v. *Partington*, 5 B. & Ad. 651; Bac. Abr., "*Actions in General*" (B); *Haddon* v. *Lott*, 15 C. B. 411; *Butler* v. *Kent*, 19 Johns. (U.S.), R. 223. See also *Boyle* v. *Brandon*, 1 M. & W. 738, and cases cited unde the maxim, *In jure non remota causa sed proxima spectatur*, *post*, p. 216.

provisions of the 16th section of the Railway Clauses Consolidation Act (8 & 9 Vict. c. 20), entitling "parties interested" to compensation (*z*).

In an action for slander, the special damage must be the legal and natural consequence of the words spoken, otherwise it will not sustain the declaration. It is not sufficient to prove a mere wrongful act of a third person induced by the slander, as, that he dismissed the plaintiff from his employ before the end of the term for which they had contracted; for this is an illegal act, which the law will not presume to be a natural result of the words spoken (*a*). So, where the plaintiff, being director of certain musical performances, brought an action on the case against the defendant, for publishing a libel on a public singer, engaged by the plaintiff, alleging that she was thereby debarred from performing in public through the apprehension of being ill received, so that the plaintiff lost the profits which would otherwise have accrued to him as such director, it was held, that the damage was too remote, and the action not maintainable (*b*).

Damages in actions on contract and in tort.

In actions on contract the damages sought to be recovered must be such as may fairly and reasonably be considered as arising naturally, *i.e.*, according to the usual

(*z*) *Ricket* v. *Metropolitan R. C.*, L. R. 2 H. L. 175, 188, 196; *Cameron* v. *Charing Cross R. C.*, 19 C. B. N. S. 764; *Herring* v. *Metropolitan Board of Works*, *Id.* 510; *Reg.* v. *Vaughan*, L. R. 4. Q. B. 190; *Reg.* v. *Metropolitan Board of Works*, *Id.* 358; *Hammersmith and City R. C.* v. *Brand*, L. R. 4 H. L. 171; *Beckett* v. *Midland R. C.*, L. R. 3 C. P. 82; *Eagle* v. *Charing Cross R. C.*, L. R. 2 C. P. 638.

(*a*) *Vicars* v. *Wilcocks*, 8 East, 1; observed upon in *Lynch* v. *Knight*, 9 H. L. Cas. 577, 590, 600. See *Knight* v. *Gibbs*, 1 A. & E. 43; *Ward* v. *Weeks*, 4 M. & P. 706.

(*b*) *Ashley* v. *Harrison*, 1 Esp. 48; *Chamberlain* v. *Boyd*, 11 Q. B. D. 407.

course of things, from such breach of contract itself or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it (*c*), and in actions of tort the same principles are applicable (*d*), although, in certain cases, an action is maintainable where the damage does not appear at first sight to flow either directly or naturally from the wrongful act, the immediate cause of the accident or injury being the act of a third party; thus, where the defendant had wrongfully placed a *chevaux de frise* across a private road, which some person removed from the place where it stood, and placed it in an upright position across the footpath by the side of the road, and the plaintiff whilst lawfully passing along the footpath in the dark came into collision with one of the spikes and injured his eye, the Court held the defendant liable, on the ground that if a person places a dangerous obstruction on a highway or private road over which there is a right of way, he is bound to take all necessary precautions to protect persons exercising their right of way, and if he neglects to do so he is liable for the consequences (*e*). The same case also decides that if the thing

(*c*) *Horne* v. *Midland R. Co.*, L. R. 8 C. P. 131; 42 L. J. C. P. 59; 28 L. T. 312; cited in *The Parana*, 2 P. D. 118; 36 L. T. 388. For a case where the damage was due to two independent causes, one being a breach by the defendant of his contract with the plaintiff, and the other the negligence of a third person, see *Burrows* v. *March Gas and Coke Company*, L. R. 7 Ex. 96; 41 L. J. Ex. 46.

(*d*) *Sharp* v. *Powell*, L. R. 7 C. P. 253; 41 L. J. C. P. 95; 26 L. T. 436.

(*e*) *Clark* v. *Chambers*, 8 Q. B. D. 327; 47 L. J. Q. B. 427; 38 L. T. 454; *Scott* v. *Shepherd*, 2 W. Bla. 892; S. C., 3 Wils. 403; *Collins* v. *Middle Level Commissioners*, L. R. 4 C. P. 279, 287. *Per* Lord Ellenborough, C.J., *Leame* v. *Bray*, 3 East, 596; *Gilbertson* v. *Richardson*, 5 C. B. 502; *Worms* v. *Storey*, 11 Exch. 427; *Guille* v. *Swan*, 19 Johns. (U. S.), R. 381; *Vander-*

is in itself dangerous, wheresoever placed, and may by some intervening act become a source of damage, the original author of the mischief is responsible should an innocent party be injured, thus illustrating the doctrine of *causa causans*.

Motives of policy, &c.

There are also cases in which, on grounds of public policy, an action may not lie (*f*), *ex. gr.* an action on the case for a malicious prosecution, though the act complained of be admitted to be malicious; as, at the suit of a subordinate against his commanding officer for libellous statements contained in an official report (*g*); or for defamatory statements made by witnesses or officials to a court martial or to a court of inquiry instituted under articles of war (*h*); and a witness in a court of justice is absolutely privileged as to anything he may say as a witness having reference to the inquiry on which he is called as a witness (*i*). An action will not lie for an act done in the course of discipline and under the powers legally incident to the situation of a commanding officer, notwithstanding that the perversion of his authority is made the ground of the action (*k*), and the principle of all such cases is, that the law will rather suffer a private

burgh v. *Truax*, 4 Denio (U. S.), R. 464; *Piggot* v. *Eastern Counties R. C.*, 3 C. B. 229 (which was case for damage caused by a spark from an engine); *per* Martin, B., *Blyth* v. *Birmingham Waterworks Co.*, 11 Exch. 783. See the maxim, *Sic utere tuo ut alienum non lædas*, *post*, p. 347.

(*f*) See *per* North, C.J., *Barnardiston* v. *Soame*, 6 St. Tr. 1099; *Swinfen* v. *Lord Chelmsford*, 5 H. & N. 890 (see *Chambers* v. *Mason*, 5 C. B. N. S. 59); *Kennedy* v. *Broun*, 13 C. B. N. S. 677.

(*g*) *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94.

(*h*) *Dawkins* v. *Lord Rokeby*, L. R. 8 Q. B. 255; L. R. 7 H. L. 744.

(*i*) *Seaman* v. *Netherclift*, 2 C. P. D. 53; 46 L. J. C. P. 128.

(*k*) *Johnstone* v. *Sutton* (in error), 1 T. R. 510, 548.

mischief than a public inconvenience (*l*). We have, moreover, already seen that, from motives of public policy, the sovereign is not personally answerable for negligence or misconduct; and if such misconduct occurs in fact, the law affords no remedy. We may add, that a mandamus, the object of which writ is to enforce a clear legal right where there is no other means of doing it, will not lie to the Crown, or its servants strictly as such, to compel the payment of money alleged to be due from the Crown (*m*).

Where the act is felonious.

In cases where the act of another, though productive of injury to an individual, amounts to a felony, it has been held (except where the statute 9 & 10 Vict. c. 93 applies) (*n*) that the private remedy is suspended until after the prosecution of the offender, and in the case of *Wellock* v. *Constantine* (*o*), where the plaintiff, a young woman, alleged that the defendant had forcibly violated her person and debauched her, whereby she became pregnant; after proof of a forcible connection amounting to rape, the learned judge nonsuited the plaintiff, holding that unless a forcible connection without the plaintiff's consent were proved no cause of action was shown, and if the cause of action was proved it would amount to a rape, in which case the action could not be maintained. This case, however, was practically overruled

(*l*) *Johnstone* v. *Sutton* (in error), 1 T. R. 510, 548; *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94. An action does not lie against a man for maliciously doing his duty, *Id.* 114; *Dawkins* v. *Lord Rokeby*, 4 F. & F. 841. See *Hodgkinson* v. *Fernie*, 3 C. B. N. S. 189.

(*m*) *Reg.* v. *Commissioners of the Treasury*, L. R. 7 Q. B. 387; 41 L. J. Q. B. 178; *Viscount Canterbury* v. *A.-G.*, 1 Phill. 306; *In re Baron de Bode*, 6 Dowl. P. C. 776.

(*n*) Amended by 27 & 28 Vict. c. 95.

(*o*) 2 H. & C. 146.

in *Wills* v. *Abrahams* (*p*), and the whole question has recently undergone discussion, and the previous authorities reviewed in *Ex parte Ball, re Shepherd* (*q*) and the *Midland Insurance Company* v. *Smith* (*r*). Lord *Bramwell*, in *Ex parte Ball*, points out that there are only four ways in which a felonious origin of the cause of action can be an impediment to an action. 1. That no cause of action arises at all out of a felony. 2. That it does not arise till prosecution. 3. That it arises on the act, but is suspended till prosecution. 4. That there is neither defence to nor suspension of the claim by or at the instance of the defendant, but that the Court of its own motion or on the suggestion of the Crown should stay proceedings till public justice is satisfied. The learned judge, after considering each of these ways, observes that although he should hesitate to say that there was no practical law by which the civil remedy was suspended, the difficulties in the application of the law were great. Mr. Justice *Williams*, in the *Midland Insurance Co.* v. *Smith*, considers the true principle of the common law to be that there is neither a merger of the civil right, nor is it a strict condition precedent to such right that there should have been a prosecution of the felon, but that there is a duty imposed upon the individual not to resort to the prosecution of his private suit to the neglect and exclusion of the vindication of the public law. Assuming, however, the existence of the duty as laid down by the learned judge, the difficulty of enforcing that duty still remains. It would seem, however, that the Court, acting under its summary jurisdiction, might interfere and prevent the plaintiff from trying his

(*p*) L. R. 7 Q. B. 554; 41 L. J. Q. B. 306; 26 L. T. 433

(*q*) 10 Ch. D. 667; 48 L. J. Bank. 57; 40 L. T. 141.

(*r*) 6 Q. B. D. 561; 50 L. J. Q. B. 329; 45 L. T. 411.

action until after the defendant had been prosecuted (*s*). In the present somewhat conflicting state of the authorities it would be extremely difficult to lay down any definite principle of law as correctly applicable to the subject under consideration, but the following principle is submitted as not being inconsistent with the most recent decisions, *i.e.* that where the alleged cause of action in itself discloses a felony the party injured is not thereby prevented from pursuing his civil remedy against the offender, and the latter cannot set up the felony as an answer to the action (*t*), but the Court may interfere and suspend the trial of the action until either the offending party has been prosecuted or the matter laid before the Public Prosecutor, and that official has declined to institute criminal proceedings. This principle is no doubt in conflict with some of the earlier cases (*u*), and the law on the point can hardly as yet be said to be completely settled (*t*). For a mere misdemeanor, however, such as an assault, battery, or libel, the right of action is subject to no such impediment as just mentioned; and even where a felony has been committed, it seems that the rule of public policy above set forth applies only to proceedings between the plaintiff and the felon himself, or, at the most, the felon and those with whom he must be sued, and does not apply where the action is brought against a third party, who is innocent of the felonious transaction (*x*). Moreover, it is clear that

(*s*) *Per* Blackburn, J., *Wills* v. *Abrahams*, L. R. 7 Q. B. at p. 562; 41 L. J. Q. B. 306; 26 L. T. 433.

(*t*) The defendant may not raise the objection upon demurrer, *Roope* v. *D'Avignon*, 10 Q. B. D. 412.

(*u*) Judgm., *Stone* v. *Marsh*, 6 B. & C. 564; *Crosby* v. *Leng*, 12 East. 409; *Williams* v. *Bayley*, L. R. 1 H. L. 200; *per* Rolfe, B., 13 M. & W. 608. See also, *per* Sir W. Scott, *The Hercules*, 2 Dods. 375-6; 1 H. Bla. 588; *Higgins* v. *Butcher*, Yelv. 89; *Chowne* v. *Baylis*, 31 L. J., Chanc. 757.

(*x*) *White* v. *Spettigue*, 13 M. &

the liability to an action cannot of itself furnish any answer to an indictment for fraud (*y*).

QUOD REMEDIO DESTITUITUR IPSA RE VALET SI CULPA ABSIT. (*Bac. Max., reg. 9.*)—*That which is without remedy avails of itself, if there be no fault in the party seeking to enforce it.*

Rule explained.

There are certain extra-judicial remedies as well for real as personal injuries, which are furnished or permitted by the law, where the parties are so peculiarly circumstanced as to make it impossible to apply for redress in the usual and ordinary methods.

"The benignity of the law is such," observes Lord *Bacon*, "that, when, to preserve the principles and grounds of law, it deprives a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse; for if it disable him to pursue his action, or to make his claim, sometimes it will give him the thing itself by operation of law without any act of his own; sometimes it will give him a more beneficial remedy" (*z*).

Doctrine of remitter.

Right by action.

On this principle depended the doctrine of remitter, which, prior to the abolition of real actions, was applicable where one who had the true property, or *jus proprietatis*, in lands, but was out of possession, and had no right to

W. 603, 606; *Lee* v. *Bayes*, 18 C. B. 599; *Stone* v. *Marsh*, 6 B. & C. 551; *Marsh* v. *Keating*, 1 Bing., N. C., 198.

(*y*) Judgm., *Reg.* v. *Kenrick*, 5 Q. B. 64, 65; in connection with which case, see *Reg.* v. *Abbott*, 1 Den. C. C. 273; *Reg.* v. *Eagleton*, Dearsl. 376, 515; *Reg.* v. *Burgon*, Dearsl. & B. 11; *Reg.* v. *Roebuck*, *Id.* 24; *Reg.* v. *Keighley*, *Id.* 145; *Reg.* v. *Sherwood*, *Id.* 251; *Reg.* v. *Bryan*, *Id.* 265; *Reg.* v. *Goss*, Bell, 208; *Reg.* v. *Ragg*, *Id.* 214; *Reg.* v. *Lee*, L. & C. 418.

(*z*) Bac. Max., reg. 9; 6 Rep. 68.

enter without recovering possession by real action, had afterwards the freehold cast upon him by some subsequent and, of course, defective title, in which case he was remitted or sent back by operation of law to his ancient and more certain title, and the right of entry which he had gained by a bad title was held to be, *ipso facto*, annexed to his own inherent good one, so that his defeasible estate was utterly defeated and annulled by the instantaneous act of law, without his participation or consent (*a*). The reason of this was, because he who possessed the right would otherwise have been deprived of all remedy; for, as he himself was the person in possession of the freehold, there was no other person against whom he could bring an action to establish his prior right; and hence the law adjudged him to be in by remitter, that is, in the like condition as if he had lawfully recovered the land by suit (*b*). There could, however, according to the above doctrine, be no remitter where issue in tail was barred by the fine of his ancestor, and the freehold was afterwards cast upon him; for he could not have recovered such estate by action, and, therefore, could not be remitted to it (*c*). Neither will the law supply a title grounded upon matter of record; as if a man be entitled to a writ of error, and the land descend to him, he shall not be in by remitter (*d*). And if land is expressly given to any person by Act of Parliament, neither he nor his heirs shall be remitted, for he shall have no other title than is given by the Act (*e*).

(*a*) See this subject treated at length, Vin. Ab., "*Remitter*;" Shep. Touch., by Preston, 156, n. (82), 286.

(*b*) Finch, Law, 19; 3 Com. by Broom & Hadley, 16; Litt., s. 661.

(*c*) 3 Com. by Broom & Hadley, 17. See also Bac. Max., vol. 4, p. 40.

(*d*) Bac. Max., reg. 9 *ad finem*.

(*e*) 1 Rep. 48.

The following instance is that usually given, in order to show the operation, and explain the meaning of the doctrine of remitter. Suppose that A. disseises B., that is, turns him out of possession, and afterwards demises the land to B. (without deed) for a term of years, by which B. enters, this entry is a remitter to B., who is in of his former and better title (*f*).

Doe d. *Daniel* v. *Woodroffe.*

In *Doe* d. *Daniel* v. *Woodroffe*, which went by writ of error before the Court of Exchequer Chamber and House of Lords (*g*), the law of remitter was much considered, and several important points were decided, which are here stated shortly, for the consideration of the reader. The facts of this case were as under :—

H. W. being tenant in tail in possession of certain lands, with the reversion to the heirs of her late husband, executed a deed-poll in 1735, which operated as a covenant to stand seised to the use of her only son, G. W., in fee. G. W. afterwards, and during the lifetime of his mother, suffered a recovery of the same lands to the use of himself in fee. He died in 1779, without issue, having by his will devised the lands to trustees and their heirs, in trust to pay an annuity to his nephew, and subject thereto to his great-nephew, W. B., for life, with certain remainders over. The trustees entered into and continued in possession until the death of the annuitant, in 1790, when they gave possession to W. B., who continued in possession of the rents and profits of the entirety up to the time of his death, in 1824; and did various acts showing that he claimed and held under the will. Upon

(*f*) Finch, Law, 61.

(*g*) 2 H. L. Cas. 811 : S. C. 15 M. & W. 769; cited *per* Rolfe, B., *Spotswood* v. *Barrow*, 5 Exch. 113; and in *Cowan* v. *Milbourn*, L. R. 2 Ex. 235; and arg. *Tarleton* v. *Liddell*, 17 Q. B. 406.

the facts thus shortly stated, the Court decided, 1st, that the base fee created by the deed-poll, did not, upon H. W.'s death, become merged in the reversion in fee in G. W.; as the estate tail still subsisted as an intermediate estate: 2ndly, that G. W. was not remitted to his title under the estate tail, the recovery suffered by him having estopped him: 3rdly, that W. B., although taking by the Statute of Uses, was capable of being remitted, as the estate tail had not been discontinued: 4thly, that the acts done by W. B. did not amount to a disclaimer by him of the estate tail, as a party cannot waive an estate to which he would be remitted, where the remitter would enure to the benefit of others as well as himself: 5thly, that the right of entry first accrued on the death of G. W., in 1779, when there was first an available right of entry; and, consequently, that the entry by W. B. in 1790 was not too late; and, 6thly, it was held, reversing the judgment given in the court below, that the entry and remitter of W. B. in 1790, did not operate to remit A. W. (his co-parcener) to the other moiety of the estate; the Court observing, with reference to the last of the above points, that possession of land by one parcener cannot, since the passing of the statute 3 & 4 Will. 4, c. 27, be considered as the possession of a co-parcener, and, consequently, that the entry of one cannot have the effect of vesting the possession in the other (*h*).

Retainer.

The principle embodied in the above maxim likewise applies in the case of *retainer* (*i*), that is, where a creditor is made executor or administrator to his debtor. If a

(*h*) Judgm., 15 M. & W. 769.

(*i*) Bac. Max., reg. 9; arg. *Thomson* v. *Grant*, 1 Russ. 540 (a). But the principle of retainer is by some writers referred to the maxim, *Potior est conditio possidentis.* See 2 Wms. Exors., 5th ed., 937 (n); 2 Fonblan. Eq., 5th ed., 406 (m).

person indebted to another makes his creditor his executor, or if such creditor obtains letters of administration to his debtor, in these cases the law gives him a remedy for his debt, by allowing him to *retain* so much as will pay himself before any other creditor whose debts are of *equal* degree. This, be it observed, is a remedy by the mere act of law, and grounded upon this reason, that the executor cannot, without an evident absurdity, commence a suit against himself (*k*) as representative of the deceased to recover that which is due to him in his own private capacity; but having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose (*l*): and, in this case, the law, according to the observation of Lord *Bacon* above given, rather puts him in a better degree and condition than in a worse, because it enables him to obtain payment before any other creditor of equal degree has had time to commence an action. An executor *de son tort* is not, however, allowed to retain, for that would be contrary to another rule of law, which will be hereafter considered—that a man shall not take advantage of his own wrong (*m*).

(*k*) A man cannot be at once *actor* and *reus* in a legal proceeding—*nemo agit in seipsum*—(Jenk. Cent. 40). See in support and illustration of this rule, *Simpson* v. *Thompson*, 3 App. Cas. 279; 38 L. T. 1; *per* Best, C.J., 4 Bing. 151; *Faulkner* v. *Lowe*, 2 Exch. 595 (the authority of which case is questioned *per* Williams, J., *Aulton* v. *Atkins*, 18 C. B. 253); *Rose* v. *Poulton*, 2 B. & Ald. 822.

(*l*) 3 Com. by Broom & Hadley, 11.

(*m*) Id. 12. See *Thomson* v. *Harding*, 2 B. & B. 630.

IN JURE NON REMOTA CAUSA SED PROXIMA SPECTATUR.

(Bac. Max., reg. 1.)—In law the immediate, not the remote, cause of any event is regarded.

How paraphrased by Lord Bacon.

"It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree (*n*). The above maxim thus explained, or rather paraphrased, by Lord *Bacon*, although of general application (*o*), is, in practice, usually cited with reference to that particular branch of the law which concerns marine (*p*) insurance; and we shall, therefore, in the first place, illustrate it by briefly adverting to some cases connected with that subject.

Marine insurance.

Perils of sea, &c.

It is, then, a well-known and established rule, that in order to entitle the assured to recover upon his policy, the loss must be a direct and not too remote a consequence of the peril insured against; and that if the proximate cause of the loss or injury sustained be not reducible to some one of the perils mentioned in the policy, the

(*n*) Bac. Max., reg. 1, cited in *Sneesby* v. *Lancashire and Yorkshire Railway*, L. R. 9 Q. B. 267; 1 Q. B. D. 42; 45 L. J. Q. B. 1; 33 L. T. 372; *Babcock* v. *Montgomery County Mutual Insurance Co.*, 4 Comst. (U. S.), R. 326.

(*o*) As to remote damage and the liability of one who is the *causa causans*, *ante*, p. 199. See *per* Lord Mansfield, C.J., *Wadham* v. *Marlow*, 1 H. Bla. 439, note.

(*p*) In *Marsden* v. *City and County Ass. Co.*, L. R. 1 C. P. 232, the same principle was applied to an insurance on plate glass in a shop front; in *Everett* v. *London Ass.*, 19 C. B. N. S. 126, it was applied to an insurance against fire, the damage having been directly caused by an explosion of gunpowder; in *Fitton* v. *Acc. Death Ins. Co.*, 17 C. B. N. S. 122, to an insurance against death by accident. For a striking illustration of this principle, see *Winspear* v. *Accidental Insurance Co. Ld.*, 6 Q. B. D. 42; 50 L. J. Q. B. 292; 43 L. T. 459.

underwriter will not be liable (*q*). If, for instance, a merchant vessel is taken in tow by a ship of war, and thus exposed to a tempestuous sea, the loss thence arising is properly ascribable to the perils of the sea (*r*). And where a ship meets with sea damage, which checks her rate of sailing, so that she is taken by an enemy, from whom she would otherwise have escaped, the loss is to be ascribed to the capture, not to the sea damage (*s*). So, the underwriters are liable for a loss arising immediately from a peril of the sea, or from fire, but remotely from the negligence of the master and mariners (*t*); and, where a ship, insured against the perils of the sea, was injured by the negligent loading of her cargo by the natives on the coast of Africa, and being pronounced unseaworthy was run ashore in order to prevent her from sinking and to save the cargo, the Court held, that the rule *Causa proxima non remota spectatur* must be applied, and that the immediate cause of loss, viz., the stranding, was a peril of the sea (*u*).

(*q*) *Taylor* v. *Dunbar*, L. R. 4 C. P. 206.

"The general rule is clear, that to constitute interest insurable against a peril it must be an interest such that the peril would by its proximate effect cause damage to the assured." Judgm., *Seagrave* v. *Union Mar. Ins. Co.*, L. R. 1 C. P. 320.

(*r*) *Hagedorn* v. *Whitmore*, 1 Stark., N. P. C., 157. See *Grill* v. *General Iron Screw Colliery Co.*, L. R. 3 C. P. 476; S. C., L. R. 1 C. P. 600.

(*s*) Judgm., *Livie* v. *Janson*, 12 East, 653; citing *Green* v. *Elmslie*, Peake, N. P. C., 212; *Hahn* v. *Corbett*, 2 Bing. 205.

(*t*) *Walker* v. *Maitland*, 5 B. & Ald. 171; *Busk* v. *R. E. A. Co.*, 2 B. & Ald. 73; *per* Bayley, J., *Bishop* v. *Pentland*, 7 B. & C. 223; *Phillips* v. *Nairne*, 4 C. B. 343, 350-1. See *Hodgson* v. *Malcolm*, 2 N. R. 336; Judgm., *Waters* v. *Louisville Insurance Co.* 11 Peters (U. S.), R. 220, 222, 223; *Columbine Insurance Co.* v. *Lawrence*, 10 Peters (U. S.), R. 517; *The Patapsco Insurance Co.* v. *Coulter*, 3 Peters (U. S.), R. 222; *General Mutual Insurance Co.* v. *Sherwood*, 14 Howard (U. S.), R. 351.

(*u*) *Redman* v. *Wilson*, 14 M. &

The maxim under consideration was discussed in the recent case of *Dudgeon* v. *Pembroke* (*x*), where a ship insured under a time policy (which does not contain an implied warranty of the seaworthiness of the ship at the inception of the risk) was lost under circumstances which, the House of Lords in giving judgment assumed, showed that the vessel was unseaworthy at the time of the loss, and would not have been lost but for her unseaworthiness, but that the immediate cause of her destruction was the violent action of the winds and waves operating from without on the hull of the vessel; it was contended on behalf of the underwriters that this did not amount to a loss by perils of the seas within the meaning of her policy; the House of Lords nevertheless held that it did, on the ground that a long course of decisions in the Courts of this country had established that *Causa proxima et non remota spectatur* is the maxim by which these contracts of insurance are to be construed, and that any loss caused immediately by perils of the seas is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it (*y*).

Where a ship, being delayed by the perils of the sea from pursuing her voyage, was obliged to put into port to repair, and, in order to defray the expenses of such repairs, the master, having no other means of raising money, sold part of the goods, and applied the proceeds in payment of these expenses, the Court held, that the underwriter was

W. 476; *Laurie* v. *Douglas*, 15 *Id.* 746; *Corcoran* v. *Gurney*, 1 E. & B. 456.

(*x*) 2 App. Cas. 284; 46 L. J. Ex. 409; 36 L. T. 382.

(*y*) *Dudgeon* v. *Pembroke*, *supra*, was followed in the *West India Panama Telegraph Co. Ld.* v. *The Home and Colonial Marine Ins. Co. Ld.*, 6 Q. B. D. 51; 50 L. J. Q. B. 41; 43 L. T. 420, where the negligence of the engineer contributed to the bursting of a boiler, whereby the vessel insured was sunk and lost.

not answerable for this loss, for the damage was to be considered, according to the above rule, as not arising *immediately* from, although in a remote sense it might be said to have been brought about by, a peril of the sea (*z*).

A policy of insurance on bags of coffee on a voyage from Rio to New Orleans and thence to New York, contained the following exception: "Warranted free from capture, seizure, and detention, and all the consequences thereof, or of any attempt thereat, and *free from all consequences of hostilities*, &c." The insured ship, whilst on her voyage, ran ashore, and was eventually lost south of Cape Hatteras. It appeared in evidence that at Cape Hatteras, until the secession of the Southern States of America, a light had always been maintained, and that the light had for hostile purposes been extinguished by the Confederates whilst in possession of the adjacent country. If the light had been maintained the ship might have been saved. Whilst she was ashore near the land a portion of the coffee was saved by certain officers acting on behalf of the Federal Government, and a further portion thereof might in like manner have been got ashore but for the interference of the Confederate troops, in consequence of which the entire residue of the cargo was wholly lost. The question upon the above facts arose—had the goods insured, or any, and if so, what portion of them, been lost by the perils of the sea, or by perils from which they were by the policy warranted free? The Court unanimously held that the insurers were liable as for a partial loss in respect of the coffee which remained on board incapable of being

(*z*) *Powell* v. *Gudgeon*, 5 M. & S. 431, 436; recognised *Sarquy* v. *Hobson*, 4 Bing. 131; *Gregson* v. *Gilbert*, cited Park, Mar. Insur., 8th ed., 138. See also *Bradlie* v. *Maryland Insurance Co.*, 12 Peters (U.S.), R. 404, 405.

saved—the proximate cause of the loss being a peril of the sea—but that as to so much of the coffee as was got ashore, and as to so much as would have been saved but for the interference of the troops, this was a loss by a consequence of hostilities within the warranty, so that in respect of it the insurers were not liable (*a*).

The preceding cases, conjointly with those below cited, in which the maxim before us has, under different states of facts, been applied (*b*), will sufficiently establish the general proposition, that, in order to recover for a loss on a maritime policy, the loss must be shown to have been directly occasioned by some peril insured against (*c*); and it is not enough that the loss has happened indirectly through a peril insured against; the loss must be occasioned by a peril insured against acting immediately on the thing insured; and, therefore, where a policy in the ordinary form insured a cargo of pilchards against capture and restraint of princes, and the captain, the ship being under convoy, on being told that if he entered the port of his destination the vessel would be lost by confiscation, was ordered by the commander of the convoy to proceed to another port, which he did, and there sold the

(*a*) *Ionides* v. *Universal Marine Insurance Co.*, 14 C. B. N. S. 259; cited *per* Willes, J., *Marsden* v. *City and County Ass. Co.*, L. R. 1 C. P. 240. *Lloyd* v. *General Iron Screw Collier Co.*, 3 H. & C. 284; *Sully* v. *Duranty*, *Id.* 270; *Cory* v. *Burr*, 8 App. Cas. 393.

Dent v. *Smith*, L. R. 4 Q. B. 414, is important in reference to the subject *supra*.

(*b*) *Naylor* v. *Palmer*, 8 Exch. 739; S. C. (affirmed in error), 10 Exch. 382, where the loss resulted from the piratical act of emigrant passengers; *M'Swiney* v. *Royal Exchange Assurance Co.*, 14 Q. B. 634, 646, which is observed upon *per Cur.* *Chope* v. *Reynolds*, 5 C. B. N. S. 651, 652.

(*c*) See also, *per* Story, J., *Smith* v. *Universal Insurance Co.*, 6 Wheaton (U. S.), R. 185; *per* Lord Alvanley, C.J., *Hadkinson* v. *Robinson*, 3 B. & P. 388; *Phillips* v. *Nairne*, 4 C. B. 343.

cargo for a nominal sum. The underwriters on the above principle were held not liable (*d*).

Exceptions in Bills of Lading.

It should be noticed that exceptions in bills of lading are not construed strictly according to the maxim *Causa proxima non remota spectatur*, but the efficient, or as it is sometimes called the *causa causans*, is regarded, to determine the liability of the shipowner on his contract of affreightment. Thus where the bill of lading contained an exception of accidents or damage of the seas, rivers, and steam navigation of whatever nature or kind soever, the shipowner was held liable for a loss of goods by collision caused by the gross negligence of the master or crew (*e*).

Contributory negligence, when no defence.

Where contributory negligence is not the proximate cause of the damage it cannot be set up as a defence. A vessel under the charge of a compulsory pilot and also in tow of a steam tug was damaged directly by the conduct of the tug. In an action brought by the owners of the vessel against the owner of the tug, the latter was not permitted to set up as a legal defence that if the pilot when the mischief was about to happen had himself done a certain thing, the mischief might have been avoided (*f*). Lord *Selborne*, in delivering judgment, remarked that "great injustice might be done if in applying the doctrine of contributory negligence to a case of this sort the maxim *Causa proxima non remota spectatur* were lost sight of.

(*d*) *Hadkinson* v. *Robinson*, 3 B. & P. 388; *Halhead* v. *Young*, 6 E. & B. 312.

(*e*) *Lloyd* v. *General Iron Screw Collier Co.*, 3 H. & C. 284; *Grill* v. *The General Iron Screw Collier Co.*, L. R. 1 C. P. 600; *The Chartered Mercantile Bank of India, &c.*, v. *The Netherland Steam Navigation Co., Limited*, 10 Q. B. D. 521; 46 L. T. (N. S.) 530.

(*f*) *Spaight* v. *Tedcastle*, 6 App. Cas. 217; 44 L. T. 589.

When the direct and immediate cause of damage is clearly proved to be the fault of the defendant, contributory negligence by the plaintiff cannot be established merely by showing that if those in charge of the ship had in some earlier state of navigation taken a course or exercised a control over the course taken by the tug which they did not actually take or exercise, a different situation would have resulted, in which the same danger might not have occurred. Such an omission ought not to be regarded as contributory negligence if it might in the circumstances which actually happened have been unattended with danger but for the defendant's fault, and if it had no proper connexion as a cause with the damage which followed as its effect" (*g*).

Again, it may, in general, be said, that everything which happens to a ship in the course of her voyage, by the immediate act of God, without the intervention of human agency, is a peril of the sea (*h*); for instance, if the ship insured is driven against another by stress of weather, the injury which she thus sustains is admitted to be direct, and the insurers are liable for it; but if the collision causes the ship injured to do some damage to the other vessel, both vessels being in fault, a positive rule of the Court of Admiralty (*i*) requires that the damage done to both ships be added together, and that the combined amount be equally divided between the owners of the two; and, in such a case, if the ship insured has done more damage than she has received, and is consequently obliged to pay the balance, this loss can neither be considered a necessary nor a proximate effect of the perils of

(*g*) P. 219.

(*h*) Park, Mar. Insur., 8th ed., 136.

(*i*) Now observed in all the Courts.

the sea. It grows out of a provision of the law of nations, and cannot be charged upon the underwriters (*k*).

Maxim—how qualified in insurance cases.

The maxim before us, however, is not to be applied in the class of cases above noticed, if it would contravene the fundamental rule of insurance law that the assurers are not liable for a loss occasioned by the wrongful act of the assured, and the manifest intention of the parties (*l*).

Assured cannot take advantage of his own wrongful act.

"It is a maxim," says Lord *Campbell* (*m*) "of our insurance law and of the insurance law of all commercial nations that the assured cannot seek an indemnity for a loss produced by his own wrongful act. The plaintiffs said truly that the perils of the seas must still be considered the proximate cause of the loss, but so it would have been if the ship had been scuttled or sunk by being wilfully run on a rock."

It has been said that the misconduct of the assured need not, in order to exempt the insurers from liability, be the direct and proximate cause, the *causa causans*, of the loss; if their misconduct was the efficient cause of the loss, the assured will be disentitled to recover (*n*). But this rule does not apply to the negligent act of the assured or his servants. If, therefore, ballast is thrown overboard by the negligent and improper, though not barratrous act of the master and crew, whereby the

(*k*) *De Vaux* v. *Salvador*, 4 A. & E. 420, 431 (cited 6 E. & B. 790), the decision in which case is controverted, 14 Peters (U. S.), R. 111; but agreed to by Mr. Phillips in his Work on Insurance, Vol. 2, No. 1416. See *per* Lord Campbell, C.J., *Dowell* v. *General Steam Nav. Co.*, 5 E. & B. 195; *per* Sir W. Scott, 2 Dods. 85, and the maxim, *Sic utere tuo ut alienum non lædas—post*, Chap. VI. § 2.

(*l*) Judgm., 6 E. & B. 948–9.

(*m*) *Thompson* v. *Hopper*, 6 E. & B.

(*n*) The above test was applied by Pollock, C. B., in *Wilson* v. *Newport Dock Co.*, 4 H. & C. 235, in regard to the conduct of the insurers. See *Alston* v. *Herring*, 11 Ex. Ch. 822.

ship becomes unseaworthy and is lost by perils of the sea, which otherwise she would have overcome, the underwriters will be liable (*o*).

And where a loss arises through the negligence of the captain in not having a pilot on board at any intermediate stage of the voyage or on entering the port of destination (except where required by the positive provisions of an Act of Parliament), the underwriters will not be discharged from their liability, if such loss be proximately caused by the perils insured against, and the master and crew were originally competent (*p*).

Actions against carriers.

The remarks just made, as well as the general principle —that the law looks to the immediate, not to the remote, cause of damage, may be further illustrated by the following cases :—An action was brought against the defendants, as carriers by water, for damage done to the cargo by water escaping through the pipe of a steam-boiler, in consequence of the pipe having been cracked by frost ; and the Court held that the plaintiff was entitled to recover, because the damage resulted from the negligence of the captain in filling his boiler before the proper time had arrived for so doing, although it was urged in argument, that the above maxim applied, and that the immediate cause of the damage was the act of God (*q*).

Maxim applies in determining

The maxim as to remoteness has an important application in connection with the measure of damages (*r*) : the

(*o*) *Sadler* v. *Dixon*, 8 M. & W. 895, cited *Wilton* v. *Atlantic Royal Mail Steam Co.*, 10 C. B. N. S. 465.

(*p*) Arnold's Marine Insurance, 5th ed. 646.

(*q*) *Siordet* v. *Hall*, 4 Bing. 607, *post*, p. 230.

(*r*) With respect to damages in general, it has been said that they are of three kinds : 1st, nominal damages, which occur in cases where the judge is bound to tell the jury only to give such ; as, for instance, where the seller brings an action for the non-acceptance of goods, the price of which has risen since the

the measure of damages.

question which in practice most frequently presents itself being—is a particular item of damage properly referable to the cause of action alleged and proved by the complainant (*s*)? The general rule (*t*) for our guidance upon this subject where the action is founded on contract or in tort has already been adverted to (*u*).

Principle on which special damage is recoverable in actions on contracts.

The principle on which special damage is held to be recoverable in actions on contracts has been very frequently discussed in our Courts (*x*). As a general rule the question whether the damage is recoverable or not is a question for the Court and not for the jury, and in a recent case it was stated that that question may be considered under three different aspects: first, was the damage the necessary consequence of the breach; secondly, was it the probable consequence; or thirdly, was it in the contemplation of the parties when the contract was made (*y*).

There would seem to be at least three classes or kinds of actions on contracts in which it is possible to formulate more or less accurately the rule of law which has generally been recognized and followed by the Courts in determining

contract was made; 2ndly, general damages, which are such as the jury may give when the judge cannot point out any measure by which they are to be assessed except the opinion and judgment of a reasonable man; 3rdly, special damages, which are given in respect of any consequences reasonably or probably arising from the breach complained of, *per* Martin, B., *Prehn* v. *Royal Bank of Liverpool*, L. R. 5 Ex. 99, 100.

(*s*) *Hodgson* v. *Sidney*, 4 H. & C. 492.

(*t*) Which was much considered in *Wilson* v. *Newport Dock Co.*, 4 H. & C. 232.

(*u*) *Supra*, p. 220.

(*x*) *British Columbia Saw Mills Co.* v. *Nettleship*, L. R. 3 C. P. 499; *Horne* v. *Midland Railway Co.*, L. R. 8 C. P. 131; 42 L. J. C. P. 59; 28 L. T. 312; *Simpson* v. *London & North-Western Railway Co*, 4 Q. B. D. 274; 45 L. J. Q. B. 182; a decision not reconcilable with some of the previous authorities. It is, however, to be noticed that the Court had power to draw inferences of fact,

(*y*) *McMahon* v. *Field*, 7 Q. B. D. 591, 595; 50 L. J. Q. B. 552.

whether or not the special damage claimed is recoverable; firstly, in actions on contracts of sale where the defendant is the manufacturer, or where the plaintiff relies on the defendant's judgment in the selection of the article required, if the defendant has notice of the circumstances out of which the claim to special damages arises, and contracts with reference thereto, the law will imply a promise on his part to make good those injuries which he is aware his default may occasion to the plaintiff (*z*); secondly, in actions on warranties or for false representations the plaintiff is entitled to recover special damage which he may have suffered by having incurred some liability or done some act upon the faith of the warranty or false representation, although the defendant had no express notice of the circumstances out of which the claim to special damage arose (*a*); thirdly, in actions against carriers of goods, the defendant, to be liable for special damage, must be shown either expressly or impliedly to have so contracted with the plaintiff as to make it a term of the bargain between the parties that he would be liable to the plaintiff for the particular damage sought to be recovered (*b*), and this must, it is submitted, be a question of fact for a jury to decide under all the circumstances of the case. The question is further complicated by the difficulty of defining special damage, and here again the decisions are somewhat conflicting. The classification

Hydraulic Engineering Co. v. *McHaffie*, 4 Q. B. D. 670; 27 W. R. 221, C. A.

(*a*) *Randall* v. *Raper*, E. B. & E. 84; *Wilson* v. *Dunville*, 6 L. R. Ir. 210; *Mullett* v. *Mason*, L. R. 1 C. P. 559; *Smith* v. *Green*, 1 C. P. D. 92; 45 L. J. C. P. 28; 33 L. T. 572. In *Randall* v. *Raper* it is to be observed that although the defendant had no express notice of the purpose for which the barley was purchased, it is questionable to what extent under the circumstances he would not be presumed to know that the plaintiffs as corn factors would re-sell the barley to sowers.

(*b*) *Horne* v. *Midland Railway Co.* cited *supra*.

already adopted may be of assistance in arriving at some definite notion on the subject; thus, in contracts of sale of goods the ordinary or natural loss sustained by the plaintiff in consequence of the non-delivery of the article contracted to be supplied would be the difference between the contract price and the market price of the article at the contract time for delivery. On the other hand, loss of profits or other loss sustained by the plaintiff by reason of stoppage of works or the inability to employ a ship or the like, caused by the non-arrival of the article, would be special damage recoverable only under special circumstances. The cases and text books mentioned in the note contain references to most of the leading authorities on the question of special damage in actions on contracts (*c*).

Rule does not apply to transaction founded in fraud.

The maxim, *In jure non remota causa sed proxima spectatur*, does not, however, apply to any transaction originally founded in fraud or covin; for the law will look to the corrupt beginning, and consider it as one entire act, according to the principle, *dolus circuitu non purgatur* (*d*)—fraud is not purged by circuity (*e*); but this maxim must be taken with a qualification in cases where the term *dolus* is used to signify deceit. In actions of

(*c*) *Elbinger* v. *Armstrong*, L. R. 9 Q. B. 473; L. J. Q. B. 211; 30 L. T. 871; *Wilson* v. *The General Iron Screw Colliery Co.*, 47 L. J. Q. B. 239, a case hardly reconcilable with previous decisions; Mayne on Damages; Addison on Contracts, 8th ed. 1104–1107; Chitty on Contracts, 11th ed. 814, 815.

(*d*) "*Dolus* here means any wrongful act tending to the damage of another:" Judgm., 6 E. & B. 948. "There can be no *dolus* without a breach of the law:" *Per* Willes, J. (citing the above maxim), *Jeffries* v. *Alexander*, 8 H. L. Cas. 637, and in *Thompson* v. *Hopper*, E. B. & E. 104; *et vide per* Bramwell, B., *Id.* 1045; *per* Williams, J., *Id.* 1054; *Fitzjohn* v. *Mackinder*, 9 C. B. N. S. 505, 514.

(*e*) Bac. Max., reg. 1; Noy, Max., 9th ed., p. 12; Tomlin's Law Dict., tit. "*Fraud.*"

deceit, in order to make the defendant liable, some connection must be shown between the party deceiving and the party deceived, as that the deception was practised by the defendant upon the plaintiff, or upon a third person with the knowledge or intent that it would or should be acted upon by the plaintiff (*f*).

Nor in criminal cases.

Neither does the above maxim, according to Lord *Bacon*, ordinarily hold in criminal cases, because in them the intention is matter of substance, and, therefore, the first motive, as showing the intention, must be principally regarded (*g*). As, if A., of malice prepense, discharge a pistol at B., and miss him, whereupon he throws down his pistol and flies, and B. pursues A. to kill him, on which he turns and kills B. with a dagger; in this case, if the law considered the immediate cause of death, A. would be justified as having acted in his own defence; but looking back, as the law does, to the remote cause, the offence will amount to murder, because committed in pursuance and execution of the first murderous intent (*h*).

Nevertheless an indictment will sometimes fail to be sustainable on the ground of remoteness (*i*). For instance —If the trustees of a road neglect to repair it in pursuance of powers vested in them by statute, and one passing along the road is accidentally killed by reason of the omission to repair, the trustees are not indictable for manslaughter, for "not only must the neglect, to make the party guilty of it

(*f*) See *Peek* v. *Gurney*, L. R. 6 H. L. 377; 43 L. J. Ch. 19; *Barry* v. *Croskey*, 2 J. & H. 117–18, 123.

(*g*) Bac. Max., vol. iv., p. 17.

(*h*) Bac. Max., reg. 1.

(*i*) See *Reg.* v. *Bennett*, Bell, C. C. 1, where fireworks kept by the prisoner in contravention of stat. 9 & 10 Will. 3, c. 7, s. 1, either accidentally or through the negligence of his servants exploded, and, setting fire to a neighbouring house, caused a person's death. Held, that the illegal act of the prisoner in keeping the fireworks was too remotely connected with the death to support an indictment for manslaughter.

liable to the charge of felony, be personal, but the death must be the immediate result of that personal neglect (*k*).

It would seem, however, that it is no defence to an indictment for manslaughter that the deceased was guilty of negligence and so contributed to his own death, if the death of the deceased is shown to have been caused in part by the negligence of the prisoner (*l*).

ACTUS DEI NEMINI FACIT INJURIAM. (2 *Bla. Com.* 21*st ed.*, 122.)—*The act of God is so treated by the law as to affect no one injuriously.*

Definition and meaning of term, *Actus Dei.*

The act of God signifies, in legal phraseology, any inevitable accident occurring without the intervention of man, and may, indeed, be considered to mean something in opposition to the act of man, as storms, tempests, and lightning (*m*). The above maxim may therefore be explained as follows: that no person shall be held liable for such a direct, violent, and sudden act of nature as could not have been foreseen by a prudent and experienced person, or resisted by those means to which a prudent and experienced person under all the circumstances of the case would ordinarily have recourse (*n*).

(*k*) *Reg.* v. *Pocock*, 17 Q. B. 34, 39; *Reg.* v. *Hughes*, Dearsl. & B. 248. See also *Reg.* v. *Gardner*, Dearsl. & B. 40, with which compare *Reg.* v. *Martin*, L. R. 1 C. C. 56.

(*l*) *R.* v. *Swindall*, 2 C. & K. 230; *R.* v. *Jones*, 11 Cox, 544; *R.* v. *Rew*, 12 Cox, 355.

(*m*) *Per* Lord Mansfield, C. J., *Farward* v. *Pittard*, 1 T. R. 33; Bell, Dict. & Dig. of Scotch Law, p. 11; *Trent Navigation* v. *Wood*, 3 Esp. 131; *Oakley* v. *Portsmouth and Ryde Steam Packet Co.*, 11 Exch. 618; *Blyth* v. *Birmingham Waterworks Co.*, 11 Exch. 781.

(*n*) *Nugent* v. *Smith*, 1 C. P. D. 428; 45 L. J. C. P. 697; 34 L. T. 827; *Nitro Phosphate Co.* v. *St. Katharine's Dock Co.*, 9 Ch. D. 516;

Liability to repair sea-wall.

Thus, if a sea-bank or wall, which the owners of particular lands are bound to repair, be destroyed by tempest, without any default in such owners, the commissioners of sewers may order a new wall to be erected at the expense of the whole level (*o*); and the reason of this is, that although, by the law, an individual be bound to keep the wall in repair, yet that which comes by the act of God shall not charge such party (*p*). But there must be no default in the owner; for, where the owner of marsh lands was bound by the custom of the level to repair the sea-walls abutting on his own land, and by an extraordinary flood-tide the wall was damaged, the Court refused to grant a mandamus to the commissioners of sewers to reimburse him the expense of the repairs, it appearing, by affidavit, that the wall had been previously presented for being in bad repair, and was out of repair at the time the accident happened (*q*). It would seem however that owners of a dock who had negligently omitted to keep up the dock wall to the height required by the statute under which the dock had been constructed, were liable only for so much of the damage caused by the overflow of an extraordinary high tide as would have happened if the tide had been an ordinary one provided the damage caused by the extra height of the tide above the ordinary high water mark is substantial and capable of being separately ascertained (*r*).

Prescriptive liability.

In another case, it was held, that a landowner may

39 L. T. 433; *Dixon* v. *Metropolitan Board of Works*, 7 Q. B. D. 418; 50 L. J. Q. B. 772; 45 L. T. 312; *Nichols* v. *Marsland*, 2 Ex. D. 1; 46 L. J. Ex. 174.

(*o*) *R.* v. *Somerset (Commissioners of Sewers)* 8 T. R. 312; Wing. Max., p. 610.

(*p*) *Keighley's case*, 10 Rep. 139; *Reg.* v. *Bamber*, 5 Q. B. 279.

(*q*) *R.* v. *Essex (Commissioners of Sewers)*, 1 B. & C. 477.

(*r*) *Nitro Phosphate Co.* v. *St. Katharine's Dock Co.*, *supra*.

be liable, by prescription, to repair sea-walls, although destroyed by extraordinary tempest; and, therefore, no presentment against such owner for suffering the walls to be out of repair, it ought not, in point of law, to be left as the sole question for the jury, whether the walls were in a condition to resist *ordinary* weather and tides; but it is a question to be determined on the evidence, whether the proprietor was bound to provide against the effects of ordinary tempests only, or of extraordinary ones also (*s*), and speaking generally it may be said that when the law creates a duty and the party is disabled from performing it without any default of his own by the act of God or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity (*t*).

In a case recently decided by the House of Lords the facts were as under:—Damage was done to a pier through the violence of the wind and waves by a vessel at a time when the master and crew had been compelled to escape from her, and had consequently no control over her—regard being had to the words of a statute applicable, the owners of the vessel were adjudged not to be liable. In this case the common law liability was held not to have been extended by the legislature, and the case had consequently to be decided by reference to that liability. "If," said Lord *Cairns*, C., (*u*), "a duty is cast upon an indivi-

(*s*) *Reg.* v. *Leigh*, 10 A. & E. 398. There is no liability at Common Law to maintain a sea wall for the benefit of other adjacent land owners. *Hudson* v. *Tabor*, 2 Q. B. D. 298; 46 L. J. Q. B. 463.

(*t*) Judgment, *Nichols* v. *Marsland*, 2 Ex. D. 4; *Paradine* v. *Jane Aleyn*, R. 27.

(*u*) *River Wear Commissioners* v. *Adamson*, 2 App. Cas. 743, referring to *Dennis* v. *Tovell*, L. R. 8 Q. B. 10.

dual by common law, the act of God will excuse him from the performance of that duty. No man is compelled to do that which is impossible."

The same principle was also exemplified in an action brought by a husband and his wife for injuries to the wife caused by the restiveness of the defendant's horses when driven by a servant of the defendant, the jury negatived all negligence in any one concerned, and the plaintiffs were held disentitled to recover compensation for the injuries thus sustained by the wife (*x*).

Apportionment of rent when land lost casualty.

Where part of land demised to a tenant is lost to him by any casualty, as the overflowing of the sea, this appears to be a case of eviction in which the tenant may claim an apportionment of the rent provided that the loss be total; for, if there be merely a partial irruption of water, the exclusive right of fishing, which the lessee would thereupon have, would be such a perception of the profits of the land as to annul his claim to an apportionment (*y*). Where, also, land is surrounded suddenly by the rage or violence of the sea, without any default of the tenant, or if the surface of a meadow be destroyed by the irruption of a moss, this is no waste (if the injury be repaired in a convenient time), but the act of God, for which the tenant is not responsible (*z*).

Destruction of premises by fire, &c.

With respect to the liability of either landlord or tenant, where premises under demise are destroyed by fire, the rule is, that, in the absence of any special contract between the parties, the landlord is never liable to rebuild, even if

(*x*) *Holmes* v. *Mather*, L. R. 10 Exch. 261; 44 L. J. Ex. 176; 33 L. T. 361. See also, as exemplifying inevitable accident, *The Buckhurst*, 6 P. D. 152; 30 W. R. 232.

(*y*) 1 Roll. Abr. 236, l. 40; Bac. Abr. "*Rent*" (M. 2). See Dyer, 56.

(*z*) *Per* Tindal, C.J., *Simmons* v. *Norton*, 7 Bing. 647, 648; Com. Dig., "*Waste*" (E. 5).

he has received the value from an insurance office (*a*); neither is the tenant, since the stat. 6 Anne, c. 31, s. 6; but the latter is liable to the payment of rent until the tenancy is determined (*b*).

In *Izon* v. *Gorton* (*c*), the defendants were tenants from year to year to the plaintiff, of the upper floors of a warehouse, at a rent payable quarterly; the premises were destroyed by an accidental fire in the middle of a quarter, and were wholly untenantable until rebuilt about seven months after; and it was held that the relation of landlord and tenant was not determined by the destruction of the premises, but that the defendants remained liable for the rent until the tenancy should be in the usual way put an end to, and that such rent was recoverable in *assumpsit* for use and occupation.

Where there is a general covenant by the lessee to repair and leave repaired at the end of the term, the lessee is clearly liable to rebuild in case of the destruction of the premises by accidental fire, or by any other unavoidable contingency, as lightning, or an extraordinary flood; and it has been decided that a tenant who has covenanted to rebuild has no equity to compel his landlord to expend money received from an insurance office, on the demised premises being burnt down (*d*). An exception of

(*a*) *Pindar* v. *Ainsley*, cited *per* Buller, J., *Belfour* v. *Weston*, 1 T. R. 312; *Bayne* v. *Walker*, 3 Dow. R. 233; *Leeds* v. *Cheetham*, 1 Sim. 146; with which *acc. Lofft.* v. *Dennis*, 1 E. & E. 474, 481.

(*b*) *Paradine* v. *Jane*, Aleyn, R. 27. As to the stat. 6 Anne, c. 31, see Lord Lyndhurst's judgment in *Viscount Canterbury* v. *A.-G.*, 1 Phill. 306.

(*c*) 5 Bing. N. C. 591; recognised *Surplice* v. *Farnsworth*, 8 Scott, N. R. 307. See *Packer* v. *Gibbins*, 1 Q. B. 421; *Upton* v. *Townend*, 17 C. B. 30.

(*d*) *Leeds* v. *Cheetham*, 1 Sim. 146; followed in *Lofft* v. *Dennis*, 1 E. & E. 474; cited in Woodfall, L. & T. 12th ed., 380.

accidents by fire and tempest is now usually introduced into leases, in order to protect the lessee (*e*).

In an action by a landlord against his tenant for rent it was held a bad plea that through the neglect and default of the landlord the house and premises which formed the subject of the letting had become unfit for habitation in consequence of defects which the tenant was not bound to rectify, and that the landlord having refused to remedy these defects when required to do so, the tenant quitted and gave up to the landlord possession of the house and premises before any of the rent claimed had become due (*f*).

Where the lessee covenants to pay rent, he is, in accordance with the above principles, bound to pay it whatever injury may happen to the demised premises (*g*); and a tenant from year to year, in order to free himself from liability in such a case, should give a regular notice to quit.

Performance of contract when excused.

Where the performance of a contract depends on the continued existence of a given person or thing, a condition may be (*h*) implied that the impossibility arising

(*e*) *Paradine* v. *Jane*, Aleyn, R. 27; cited, *per* Lord Ellenborough, C. J., 10 East, 533, and *Spence* v. *Chodwick*, 10 Q. B. 517, 530; *per* Lord Campbell, C. J., *Hall* v. *Wright*, E. B. & E. 761; *per* Martin, B., *Id.* 789; *Brown* v. *Royal Insur. Co.*, 1 E. & E. 853, 859; arg., *Brecknock Co.* v. *Pritchard*, 6 T. R. 751; recognised *per* Lord Kenyon, C.J., *Id.* 752; Finch, Law, 64.

"By the common law of England a person who expressly contracts absolutely to do a thing, not naturally impossible, is not excused for non-performance because of being prevented by the act of God." Judgm., *Lloyd* v. *Guibert*, L. R. 1 Q. B. 121; citing *Paradine* v. *Jane*, *supra*.

(*f*) *Murray* v. *Mace*, 8 Ir. R. C. L. 396.

(*g*) In an action of debt for rent due under a lease, held that the destruction of the premises by fire would not excuse the lessee from payment of the rent according to his covenant; *Hallett* v. *Wylie*, 3 Johnson (U. S.), R. 44.

(*h*) "The act of God is in some cases said to excuse the breach of a

from the perishing of the person or thing shall excuse the performance (*i*).

"Where personal considerations," it has been said (*k*), "are of the foundation of the contract, as in cases of principal and agent, and master and servant, the death of either party puts an end to the relation; and in respect of service after the death, the contract is dissolved, unless there be a stipulation, express or implied, to the contrary." To an action for breach of a covenant to serve contained in an apprenticeship deed, the defendant, the father of the apprentice, pleaded that the apprentice was prevented "by the act of God, to wit, by permanent illness happening and arising after the making of the indenture, from remaining with or serving" the plaintiff during the said term; and this plea was held good in excuse of performance, on the ground that, from the nature of the contract, it was necessarily to be implied that the continued existence of the apprentice in a state to perform his part of it was contemplated by the contracting parties, and that, if prevented by the act of God, the performance was to be excused (*l*).

contract. This is, in fact, an inaccurate expression, because where it is an answer to a complaint of an alleged breach of contract, that the thing done or left undone was so by the act of God, what is meant is, that it was not within the contract." Judgm., *Baily* v. *De Crespigny*, L. R. 4 Q. B. 185; citing *per* Maule, J., *Canham* v. *Barry*, 15 C. B. 619; and in *Mayor of Berwick* v. *Oswald*, 3 E. & B. 665; *Shelley's case*, 1 Rep. 98, a; *Brewster* v. *Kitchell*, 1 Salk. 198.

(*i*) Judgm., *Taylor* v. *Caldwell*, 3 B. & S. 826; cited with approval in *Robinson* v. *Davison*, L. R. 6 Ex. 269; 40 L. J. Ex. 172; 24 L. T. 755; *Howell* v. *Coupland*, L. R. 9 Q. B. 462; 1 Q. B. D. 258; 46 L. J. Q. B. 147; 33 L. T. 832; *Anglo-Egyptian Co.* v. *Rennie*, L. R. 10 C. P. 271; 44 L. J. C. P. 130; 32 L. T. 467.

(*k*) *Per* Willes, J., *Farrow* v. *Wilson*, L. R. 4 C. P. 744, 746.

(*l*) *Boast* v. *Firth*, L. R. 4 C. P. 1. In *Hall* v. *Wright*, E. B. & E. 749, Crompton, J., observes, "Where a contract depends upon personal skill, and the act of God renders it impossible, as, for instance, in the case of a painter employed to paint a picture who is struck blind, it may be

Again, the plaintiffs contracted to erect certain machinery on the defendant's premises, at specific prices for particular portions, and to keep it in repair for two years —the price to be paid upon the completion of the whole. After some portions of the work had been finished—other portions being in course of completion—the premises, with the machinery and materials thereon, were accidentally destroyed by fire: *Held*, that both parties were excused from further performance of the contract, but that the plaintiffs were not entitled to sue in respect of those portions of the work which had been completed, the *ratio decidendi* being thus expressed:—"The plaintiffs having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract" (*m*).

So if the condition of a bond was possible at the time of making it, and afterwards becomes impossible by the act of God, the obligor shall be excused (*n*); and, it is

that the performance might be excused, and his death might also have the same effect.

And Pollock, C.B., remarks (*Id.* 793), "All contracts for personal services which can be performed only during the lifetime of the party contracting, are subject to the implied condition that he shall be alive to perform them, and should he die his executor is not liable to an action for the breach of contract occasioned by his death." See *Stubbs* v. *Holywell R. C.*, L. R. 2 Ex. 311, 314.

Where incapacity to perform a contract is occasioned by the act of God, the contractor may be justified in determining the contract. See judgm., *Cuckson* v. *Stone*, 1 E. & B. 257.

(*m*) *Appleby* v. *Myers*, L. R. 2 C. P. 651, 661. If the defendant prevents a certain condition being performed, the performance of which is a condition precedent to the payment of the price, the plaintiff can recover the price although the condition is never performed. *Mackay* v. *Dick*, 6 App. Cas. 251; *Bradley* v. *Benjamin*, 46 L. J. Q. B. 590.

(*n*) *Per* Williams, J., 9 C. B. N. S. 747; Com. Dig. "*Condition*," L.

said, that, if the condition be in the disjunctive, with liberty to the obligor to do either of two things at his election, and both are possible at the time of making the bond, and afterwards one of them becomes impossible by the act of God, the obligor shall not be bound to perform the other (*o*). The foregoing statement of the law must, however, be received with caution if not with some qualification since the decision of Kindersley, V.-C., in *Barkworth* v. *Young* (*p*), in which case that learned judge, after reviewing the previous authorities on the subject, thus proceeds: "It appears to me that it is impossible to lay down any universal proposition either way, but that the principle to be applied in each case is, that it must depend upon the intention of the parties to the bond, covenant, or agreement. . . . . If the Court is satisfied that the clear intention of the parties was that one of them should do a certain thing, but he is allowed at his option to do it in one of two modes, and one of these modes becomes impossible by the act of God, he is bound to perform it in the other mode" (*q*).

Again, if a lessee covenants to leave a wood in as good a plight as the wood was in at the time of making the lease, and afterwards the trees are blown down by tempests, he is discharged from his covenant (*r*).

12 D. 1; 2 Bla. Com., 21st ed., 340; Co. Litt. 206, a; *Williams* v. *Hide*, Palm. R. 548. See Roll. Abr. 450, 451.

(*o*) Com. Dig., "*Condition*," D. 1; *Laughter's case*, 5 Rep. 22; followed in *Jones* v. *How*, *infra*; Wing. Max., p. 610. See *per* Crompton, J., *Esposito* v. *Bowden*, 4 E. & B. 974, 975; S. C., 7 *Id.* 763; 1 B. & S. 194.

(*p*) 4 Drewry. 1.

(*q*) A man may for a good consideration, contract to do that which he cannot be sure that he will be able to do (see *per* Maule, J., *Canham* v. *Barry*, 15 C. B. 619, and in *Jones* v. *How*, 9 C. B. 10), and which may by the *actus Dei* become impracticable, and yet be absolutely bound, *i.e.*, bound, on default, to compensate the contractee in damages.

(*r*) 1 Rep. 98.

Condition in a devise or conveyance.

In a devise or conveyance of lands, on a condition annexed to the estate conveyed, which is possible at the time of making it, but afterwards becomes impossible by the act of God, there, if the condition is *precedent*, no estate vests at law or in equity, because the condition cannot be performed; but, if *subsequent*, the estate becomes absolute in the grantee, for the condition is not broken (*s*). Thus, where a man enfeoffed another, on the condition subsequent of re-entry, if the feoffor should within a year go to Paris about the feoffee's affairs, but feoffor died before the year had elapsed, the estate was held to be absolute in the feoffee (*t*). So, where a man devised his estate to his eldest daughter, on condition that she should marry his nephew on or before her attaining twenty-one years; but the nephew died young, and the daughter was never required, and never refused to marry him, but, after his death, and before attaining twenty-one years, married; it was held that the condition was unbroken, having become impossible by the act of God (*u*).

Carrier not liable for act of God.

By the custom of the realm, common carriers are bound to receive and carry the goods of the subject for a reasonable hire or reward, to take due care of them in their passage, to deliver them safely and within a reasonable time (*x*), or in default thereof to make compensation to the owner for loss, damage, or delay, which happens while the goods are in their custody. Where, however,

(*s*) Com. Dig. "*Condition*," D. 1; Co. Litt. 206, a; and Mr. Butler's note (1); *Id.* 218 a, 219 a.

(*t*) Co. Litt. 206 a.

(*u*) *Thomas* v. *Howell*, 1 Salk. 170; *Aislabie* v. *Rice*, 8 Taunt. 459; but see in case of legacy with condition attached, *Dawson* v. *Oliver Massey*, 2 Ch. D. 753, C. A., reversing Jessel, M.R., 45 L. J. Ch. 217; 34 L. T. 120.

(*x*) *Taylor* v. *Great Northern R. Co.*, L. R. 1 C. P. 386.

such loss, damage, or delay arises from the act of God, as storms, tempests, and the like, the maxim under consideration applies, and the loss must fall upon the owner, and not upon the carrier (*y*). And so, if the thing is lost partly by reason of its own inherent vice and partly in consequence of the act of God, the carrier is relieved from liability (*z*); in this case *res perit suo domino* (*a*).

For damage occasioned by accidental fire resulting neither from the act of God nor of the king's enemies, a common carrier, being an insurer, is responsible (*b*). But where an injury is sustained by a passenger, from an inevitable *accident* (*c*), the coach-owner is not liable, provided there were no negligence in the driver (*d*). And the breach of a contract to convey a passenger from A. to B., if caused by *vis major*, would seem to be excusable (*e*), the principle being that a carrier of passengers does not warrant or insure the safety of his passengers, but contracts merely

(*y*) *Amies* v. *Stevens*, Stra. 128; *Trent Navigation* v. *Wood*, 3 Esp. 127; *per* Powell, J.; *Coggs* v. *Bernard*, 2 Lord Raym. 910, 911; *per* Tindal, C.J., *Ross* v. *Hill*, 2 C. B. 890; *Walker* v. *British Guarantee Society*, 18 Q. B. 277, 287.

(*z*) *Nugent* v. *Smith*, 1 C. P. D. 423; 45 L. J. C. P. 697; 34 L. T. 827.

(*a*) As to this maxim, see Bell, Dict. and Dig. of Scotch Law, 857; *Appleby* v. *Myers*, L. R. 2 C. P. 651, 659, 660; *Bayne* v. *Walker*, 3 Dow. R. 233; *Payne* v. *Meller*, 6 Ves. 349; *Bryant* v. *Busk*, 4 Russ. 1; *Logan* v. *Le Mesurier*, 6 Moo. P. C. C. 116.

(*b*) Story on Bailments, 5th ed., s. 528; *Collins* v. *Bristol and Exeter R. C.*, 1 H. & N. 517; *Liver. Alkali Works* v. *Johnson*, *infra*, n. (*f*).

(*c*) As to the meaning of this word, see *Fenwick* v. *Schmalz*, L. R. 3 C. P. 313; *Readhead* v. *Midland R. Co.*, L. R. 4 Q. B. 379; *Richardson* v. *Great Eastern Railway Co.*, L. R. 10 C. P. 486, 493, in C. A. 1 C. P. D. 342; 35 L. T. 351.

(*d*) *Aston* v. *Heaven*, 2 Esp. 533; *per* Parke, J., *Crofts* v. *Waterhouse*, 3 Bing. 321. See *Sharp* v. *Grey*, 9 Bing. 457; *Perren* v. *Monmouthshire R. and Can. Co.*, 11 C. B. 855.

(*e*) *Per* Lord Campbell, C. J., *Denton* v. *Great Northern R. C.*, 25 L. J. Q. B. 129; S. C., 5 E. & B. 860; *Briddon* v. *Great Northern R. Co.*, 28 L. J. Ex. 51; *Great*

to take all due and reasonable care (including in that term the use of skill and foresight) to carry his passengers safely (*f*).

The following cases may also be noticed as applicable to the present subject, and as showing that death, which is the act of God, shall not be allowed to prejudice an innocent party if such a result can be avoided :—Lessor and lessee, in the presence of lessor's attorney, signed an agreement that a lease should be prepared by lessor's attorney, and paid for by lessee. The lease was prepared accordingly, but the lessor, who had only a life estate in the property to be demised, died, and the lease consequently was never executed. It was held, that the lessor's attorney was entitled to recover from lessee the charge for drawing the lease, for it was known to all the parties that the proposed lessor had only a life estate; and the non-execution of the lease was owing to no fault of the attorney, who ought not, therefore, to remain unpaid (*g*).

The case of *Reg.* v. *The Justices of Leicestershire* (*h*), where a peremptory mandamus was issued to Quarter Sessions to hear an appeal against a bastardy order of two justices, offers another apt illustration of the maxim now before us. There it appeared that the appellant, having

Western R. C. of Canada v. *Braid*, 1 Moo. P. C. C. 101, and cases there cited. See *Kearon* v. *Pearson*, 7 H. & N. 386.

(*f*) *Redhead* v. *Midland R. Co.*, L. R. 4 Q. B. 379, 381, with which compare *Liver. Alkali Works* v. *Johnston*, L. R. 9 Ex. 338; 43 L. J. Ex. 216; 31 L. T. 95, as to the liability of a carrier of goods, and *Randall* v. *Newson*, 2 Q. B. D. 102; 46 L. J. Q. B. 257; 36 L. T. 164, as to the obligation of a vendor of a chattel for a specific purpose.

(*g*) *Webb* v. *Rhodes*, 3 Bing. N. C. 732.

For another illustration of the above maxim, see *Morris* v. *Matthews*, 2 Q. B 293. See also *per* Best, C. J., *Tooth* v. *Bagwell*, 3 Bing. 375.

(*h*) 15 Q. B. 88.

entered into the proper recognizances, on the same day sent by post a written notice of his having done so in pursuance of the stat. 8 & 9 Vict. c. 10, s. 3, addressed to the mother of the child; three days, however, before this notice was posted, the woman had died, and upon this state of facts the sessions refused to hear the appeal, considering that the appellant had not complied with the requirements of the statute. But the Court of Queen's Bench held that as the duty of the appellant to give the notice in question was cast upon him by the law, not by his own voluntary contract, he was excused from performing that duty, inasmuch as it had become impossible by the act of God (*i*).

Rule—where inapplicable.

The above general rule must, however, be applied with due caution (*k*). Thus, where, after the indictment—arraignment—the jury charged—and evidence given on a trial for a capital offence, one of the jurymen became incapable, through illness, of proceeding to verdict, the court of oyer and terminer discharged the jury, charged a fresh jury with the prisoner, and convicted him, although it was argued that *actus Dei nemini nocet*, and that the sudden illness was a Godsend, of which the prisoner ought to have the benefit (*l*).

Lastly, illness of a material witness is a sufficient ground to excuse a plaintiff in not proceeding to try, and so would be the death of one of two co-defendants, no suggestion of it having been made on the record, the trial being thus suspended by the act of God (*m*).

(*i*) See also, in further illustration of the maxim as to *actus Dei*, *Newton* v. *Boodle*, 3 C. B. 795.

(*k*) Lord Raym. 433.

(*l*) *R.* v. *Edwards*, 4 Taunt. 309, 312.

(*m*) *Pell* v. *Linnell*, L. R. 3 C. P. 441.

LEX NON COGIT AD IMPOSSIBILIA. (*Co. Litt.* 231, *b*).—*The law does not seek to compel a man to do that which he cannot possibly perform.*

Meaning of rule, and examples of its application.

This maxim, or, as it is also expressed, *impotentia excusat legem* (*n*), is intimately connected with that last considered, and must be understood in this qualified sense, that *impotentia* excuses when there is a necessary or invincibile disability to perform the mandatory part of the law, or to forbear the prohibitory (*o*); and is akin to the maxim of the Roman law, "*nemo tenetur ad impossibilia*," which, derived from common sense and natural equity, has been adopted and applied by the law of England under various and dissimilar circumstances, *e.g.* to a contract by charter party where performance has been rendered impossible (*p*).

The law itself and the administration of it, said Sir *W. Scott*, with reference to an alleged infraction of the revenue laws, must yield to that to which everything must bend—to necessity; the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling to impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases. "In the performance of that duty, it has three points to which its attention must be directed. In the first place, it must see that the nature of the necessity pleaded be such as the law itself would respect, for there may be a necessity which it would not. A

(*n*) Co. Litt. 29 a.
(*o*) Hobart, 96.
(*p*) *The Teutonia*, L. R. 3 Ad. & E. 394, 416; L. R. 4 P. C. C. 171; 41 L. J. Adm. 57; 26 L. T. 48.

necessity created by a man's own act, with a fair previous knowledge of the consequences that would follow, and under circumstances which he had then a power of controlling, is of that nature. Secondly, that the party who was so placed, used all practicable endeavours to surmount the difficulties which already formed that necessity, and which, on fair trial, he found insurmountable. I do not mean all the endeavours which the wit of man, as it exists in the acutest understanding, might suggest, but such as may reasonably be expected from a fair degree of discretion and an ordinary knowledge of business. Thirdly, that all this shall appear by distinct and unsuspected testimony, for the positive injunctions of the law, if proved to be violated, can give way to nothing but the clearest proof of the necessity that compelled the violation" (*q*).

It is, then, a general rule which admits of ample practical illustration, that *impotentia excusat legem;* where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over, there the law will in general excuse him (*r*): *ex. gr.*, If performance of the condition of a bond be rendered impracticable by an Act of Parliament the obligor will be discharged (*s*).

The maxim under notice may, in the first place, be exemplified by reference to the law of mandamus:—

Mandamus.

A writ of mandamus issuing to a railway or other company, enjoining them to prosecute works in pursuance of

(*q*) *The Generous*, 2 Dods. 323, 324.

(*r*) *Paradine* v. *Jane*, Aleyn, 27; cited *per* Lawrence, J., 8 T. R. 267. See *Evans* v. *Hutton*, 5 Scott, N. R. 670, and cases cited, *Id.* 681.

(*s*) *Brown* v. *Mayor, &c., of London*, 9 C. B. N. S. 726; S. C., 13 *Id.* 828.

statutory requirements, supposes the required act to be possible, and to be obligatory when the writ issues; and, in general, the writ suggests facts showing the obligation, and the possibility of fulfilling it (*t*); though, where an obligation is shown to be incumbent on the company, the onus lies upon those who contest the demand of fulfilment of proving that it is impossible (*u*); if they succeed in doing so, the doctrine applies that "on mandamus, *nemo tenetur ad impossibilia*" (*x*); and upon the same principle, where an order had been made by the Board of Trade upon a railway company requiring the company to carry a certain turnpike road across their railway, the Court refused a mandamus to compel the company to carry out the order upon proof that the company had no funds and was practically defunct, and was not in a position to comply with the mandamus, if granted (*y*).

Covenant may be repealed by statute.

Again we find it laid down, that "where H. covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant. So, if H. covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is

(*t*) *Reg.* v. *London and North Western R. C.*, 16 Q. B. 864, 884; *Reg.* v. *Ambergate, &c., R. C.*, 1 E. & B. 372, 381. See *Reg.* v. *York and North Midland R. C.*, 1 E. & B. 178; S. C. (reversed in error), *Id.* 858; *Reg.* v. *Great Western R. C.*, 1 E. & B. 253; S. C. (reversed in error), *Id.* 874; *Reg.* v. *South Eastern R. C.*, 4 H. L. Cas. 371; *Reg.* v. *Lancashire and Yorkshire R. C.*, 1 E. & B. 228; S. C. (reversed in error), *Id.* 873 (a); Tapping on Mandamus, 359.

(*u*) *Reg.* v. *York, Newcastle, and Berwick R. C.*, 16 Q. B. 886, 904; *Reg.* v. *Great Western R. C.*, 1 E. & B. 774.

(*x*) *Per* Lord Campbell, C.J., *Reg.* v. *Ambergate, &c., R. C.*, 1 E. & B. 380. See *Reg.* v. *Coaks*, 3 E. & B. 249.

(*y*) *Re The Bristol and North Somerset R. Co.*, 3 Q. B. D. 10; 47 L. J. Q. B. 48; 37 L. T. 527.

repealed. But, if a man covenants not to do a thing which then was unlawful, and an Act comes and makes it lawful to do it, such Act of Parliament does not repeal the covenant" (*z*). If, before the expiration of the running days allowed by a charter-party for loading, the performance of his contract by the shipper becomes, by virtue of an Order in Council, illegal, he is discharged (*a*).

Contracts impossible of performance.

If, however, as above stated, a person, by his own contract, absolutely engages to do an act, it is deemed to be his own fault and folly that he did not thereby *expressly* provide against contingencies, and exempt himself from responsibility in certain events: in such case, therefore, that is, in the instance of an absolute and general contract, the performance is not excused by an inevitable accident or other contingency, although not foreseen by nor within the control of the party (*b*); thus, where the plaintiff agreed to build and complete

(*z*) *Brewster* v. *Kitchell*, 1 Salk. 198; *Newington Local Board* v. *Nottingham Local Board*, 12 Ch. D. 725; 48 L. J. Ch. 226; 40 L. T. 58; *Davis* v. *Cary*, 15 Q. B. 418; *Wynn* v. *Shropshire Union R. and Can. Co.*, 5 Exch. 420, 440, 441; *Doe* d. *Lord Anglesey* v. *Churchwardens of Rugeley*, 6 Q. B. 107, 114. See also *Doe* d. *Lord Grantley* v. *Butcher*, *Id.* 115 (b).

(*a*) *Reid* v. *Hoskins*, 6 E. & B. 953; S. C., 5 *Id.* 729, 4 *Id.* 979; *Avery* v. *Bowden*, 6 E. & B. 953, 962; S. C. 5 *Id.* 714. See *Esposito* v. *Bowden*, 4 E. & B. 963; S. C., 7 *Id.* 763; 1 B. & S. 194; *Pole* v. *Cetcovitch*, 9 C. B. N. S. 430. Parties may by apt words bind themselves by a contract as to any *future* state of the law; *per* Maule, J., *Mayor of Berwick* v. *Oswald*, 3 E. & B. 665; S. C., 5 H. L. Cas. 856; *Mayor of Dartmouth* v. *Silly*, 7 E. & B. 97.

(*b*) *Per* Lawrence, J., *Hadley* v. *Clarke*, 8 T. R. 267; *per* Lord Ellenborough, C.J., *Atkinson* v. *Ritchie*, 13 East, 533, 534; *Marquis of Bute* v. *Thompson*, 13 M. & W. 487; *Hills* v. *Sughrue*, 15 M. & W. 253, 262; *Jervis* v. *Tomkinson*, 1 H. & N. 195, 208; *Spence* v. *Chodwick*, 10 Q. B. 517, 528 (recognising *Atkinson* v. *Ritchie*, *supra*); *Schilizzi* v. *Derry*, 4 E. & B. 873; *Hale* v. *Rawson*, 4 C. B. N. S. 85; *Adams* v. *Royal Mail Steam Packet Co.*, 5 C. B. N. S. 492.

by a day named certain specified works, subject to alterations or additions to be ordered by the defendants, as mentioned in the agreement, and the defendants ordered certain alterations and additions to be made which prevented the plaintiff from finishing the work by the day named, it was held that the plaintiff was liable to pay to the defendants the penalties provided in the agreement if the works were not completed by the day named (*c*). And, if the condition of a bond be impossible at the time of making it, the condition alone is void and the bond shall stand single and unconditional (*d*).

Impossible condition.

When performance of the condition of a bond becomes impossible by the act of the obligor, such impossibility forms no answer to an action on the bond (*e*): for, "in case of a private contract, a man cannot use as a defence an impossibility brought upon himself" (*f*). But the performance of a condition shall be excused by the default of the obligee, as by his absence, when his presence was necessary for the performance (*g*), or if he do any act which renders it impossible for the obligor to perform his engagement (*h*). And, indeed, it may be laid

(*c*) *Jones* v. *St. John's College*, L. R. 6 Q. B. 115.

(*d*) Co. Litt. 206, a.; *Sanders* v. *Coward*, 15 M. & W. 48; Judgm., *Duvergier* v. *Fellows*, 5 Bing. 265. See also Dodd, Eng. Lawy. 100. Where a literal compliance with the condition in a gift of a legacy is impossible from unavoidable circumstances, see *Dawson* v. *Oliver Massey*, 2 Ch. D. 753, C. A., reversing decision of Jessel, M.R., 45 L. J. Ch. 217; 34 L. T. 120.

(*e*) Judgm. *Beswick* v. *Swindells*, 3 A. & E. 883.

(*f*) *Per* Lord Campbell, C.J., *Reg.* v. *Caledonian R. C.*, 16 Q. B. 28.

(*g*) Com. Dig., "*Condition*," L. 4, 5; cited, *per* Tindall, C.J., *Bryant* v. *Beattie*, 4 Bing. N. C. 263.

(*h*) Com. Dig., "*Condition*," L. 6; *per* Parke, B., *Holme* v. *Guppy*, 3 M. & W. 389; *Thornhill* v. *Neats*, 8 C. B. N. S. 831, 846; *Russell* v. *Da Bandeira*, 13 *Id.* 149, 203, 205. See *Roberts* v. *Bury Commissioners*, L. R. 4 C. P. 759.

down generally, as clear law, that, if there is an obligation defeasible on performance of a certain condition, and the performance of the condition becomes impossible by the act of the obligee, the obligor shall be excused from the performance of it (*i*).

It seems, however, that the performance of a condition precedent, on which a duty attaches, is not excused, where the prevention arises from the act or conduct of a mere stranger. If a man, for instance, covenant that his son shall marry the covenantee's daughter, a refusal by her will not discharge the covenantor from making pecuniary satisfaction (*k*). So, if A. covenant with C. to enfeoff B., A. is not released from his covenant by B.'s refusal to accept livery of seisin (*l*).

Impossible consideration.

Further, where the consideration for a promise is such that its performance is utterly and naturally impossible, such consideration is insufficient, for no benefit can, by any implication be conferred on the promissor (*m*), and the law will not notice an act the completion of which is obviously ridiculous and impracticable. In this case, therefore, the maxim of the Roman law applies—*Impossibilium nulla obligatio est* (*n*). Moreover, a promise is not binding, if the consideration for making it be of such a nature, that it was not in fact or law in the power of the promisee, from whom it moved, to complete such consideration, and

(*i*) Judgm., *Hayward* v. *Bennett*, 3 C. B. 417, 418 (citing Co. Litt. 206, a.) ; S. C., 5 C. B. 593.

(*k*) Perkins, s. 756.

(*l*) Co. Litt. 209, a. ; *per* Lord Kenyon, C.J., *Cook* v. *Jennings*, 7 T. R. 384, and in *Blight* v. *Page*, 3 B. & P. 296, n. See *Lloyd* v. *Crispe*, 5 Taunt. 249 ; Bac. Abr., "*Conditions*," Q. 4 ; cited *Thornton* v. *Jenyns*, 1 Scott, N. R. 66.

(*m*) *Chanter* v. *Leese*, 4 M. & W. 295 ; *per* Holt, C.J., *Courtenay* v. *Strong*, 2 Lord Raym. 1219.

(*n*) D. 50. 17. 185 ; 1 Pothier, Oblig. pt. 1, c. 1, s. 4, § 3 ; 2 Story, Eq. Jurisp., 6th ed., 763.

to confer on the promissor the full benefit meant to be derived therefrom (*o*): Thus, if a man contract to pay a sum of money in consideration that another has contracted to do certain things, and it should turn out before anything is done under the contract, that the latter party was incapable of doing what he engaged to do, the contract is at an end: the party contracting to pay his money is under no obligation to pay for a less consideration than that for which he has stipulated (*p*). But if a party by his contract lay a charge upon himself, he is bound to perform the stipulated act, or to pay damages for the non-completion (*q*), unless the subject-matter of the contract were at the time manifestly and essentially impracticable; for the *improbability* of the performance does not render the promise void, because the contracting party is presumed to know whether the completion of the duty he undertakes be within his power; and, therefore, an engagement upon a sufficient consideration for the performance of an act, even by a third person, is binding, although the performance of such act depends entirely on the will of the latter (*r*). Neither will the promissor be excused, if the performance of his promise be rendered impossible by the act of a third party (*s*); though, if an exercise of public authority render impossible the further performance of a contract which has been in part per-

(*o*) *Harvey* v. *Gibbons*, 2 Lev. 161; *Nerot* v. *Wallace*, 3 T. R. 17.

(*p*) *Per* Lord Abinger, C.B., 4 M. & W. 311.

(*q*) See *Thornborow* v. *Whitacre*, 2 Lord Raym. 1164; *Pope* v. *Bavidge*, 10 Exch. 73; *Hale* v. *Rawson*, 4 C. B. N. S. 85, 95; *Jones* v. *St. John's College*, L. R. 6 Q. B. 124; 40 L. J. Q. B. 80.

(*r*) 1 Pothier, Oblig., pt. 1, c. 1, s. 4, § 2; *M'Neill* v. *Reid*, 9 Bing. 68.

(*s*) *Thurnell* v. *Balbirnie*, 2 M. & W. 786; *Brogden* v. *Marriott*, 2 Bing. N. C. 473.

formed, the contract is, *ipso facto*, dissolved(*t*); but an insurance company who had undertaken, having the option to do so, to reinstate the insured premises which had been damaged by fire, were held not to be excused from their contract by reason of the public authorities having subsequently taken down the premises as dangerous, on account of defects not caused by the fire (*u*).

It is a principle of law that if by any act of one of the parties the performance of a contract is rendered impossible, the other side may if they choose rescind the contract; and it appears sufficient if the contract cannot be performed in the manner stipulated, though it may be performed in some other manner not very different (*x*). And if a party, by his own act, disables himself from fulfilling his contract, he thereby makes himself at once liable for a breach of it, and dispenses with the necessity of any request to perform it by the party with whom the contract has been made (*y*); and this is in accordance with an important rule of law, which we shall presently consider; viz., that "a man shall not take advantage of his own wrong" (*z*).

If, however, after the position of two contracting parties has been materially altered under the contract, one of the

(*t*) *Melville* v. *De Wolf*, 4 E. & B. 844, 850; *Esposito* v. *Bowden*, *Id.* 963, 976.

(*u*) *Brown* v. *Royal Ins. Co.*, 1 E. & E. 853.

(*x*) *Panama Telegraph Company* v. *India Rubber Telegraph Works*, L. R. 10 Ch. 532; 45 L. J. Ch. 121; 32 L. T. 517.

(*y*) *Lovelock* v. *Franklin*, 8 Q. B. 371; *Hochster* v. *De La Tour*, 2 E. & B. 678; cited and distinguished in *Churchward* v. *Reg.*, L. R. 1 Q. B. 208; *per* Williams, J., 3 C. B. N. S. 166; *Danube, &c.*, *R. C.* v. *Xenos*, 13 C. B. N. S. 825; *Lewis* v. *Clifton*, 14 C. B. 245; arg. *Reid* v. *Hoskins*, 6 E. & B. 960–1, and 5 *Id.* 737, 4 *Id.* 982; *Avery* v. *Bowden*, 5 E. & B. 722; S. C., 6 *Id.* 953. See *Jonassohn* v. *Young*, 4 B. & S. 300.

(*z*) *Post*, p. 273.

parties repudiates his obligation, and refuses further to perform his part of the contract, that does not entitle the other party to rescind it, but he must resort to his action for damages, and, therefore, in a sense, a man can sometimes take advantage of his own wrong, because damages may not compensate the complaining party (*a*).

Additional examples.

The following additional illustrations of the maxim before us may also be specified. The appellant having applied to justices to state a case under the stat. 20 & 21 Vict. c. 43, received the case from them on Good Friday, and transmitted it to the proper Court on the following Wednesday. He was held to have sufficiently complied with the requirements of the second section of the Act, which directs that the case shall be transmitted by the appellant within three days after he has received it; for the offices of the Court having been closed from Friday till Wednesday it would have been impossible to have transmitted the case sooner (*b*). And where an appeal against an order of an assessment committee had to be made to the next Sessions, it was held that the next Sessions must be construed to mean the next practicable sessions, and not necessarily the next sessions immediately following the date of the order, as such a construction would not have afforded the aggrieved party time to consider whether he would appeal or not (*c*).

To several maxims in some measure connected with that above considered, it may, in conclusion, be proper

(*a*) *Sheffield Nickel Company* v. *Unwin*, 2 Q. B. D. 214; 46 L. J. Q. B. 299; 36 L. T. 246.

(*b*) *Mayer* v. *Harding*, L. R. 2 Q. B. 410, where Mellor, J., says that where a statute requires a thing to be done within any particular time, such time may be circumscribed by the fact of its being impossible to comply with the statute on the last day of the period so fixed.

(*c*) *The Queen* v. *Justices of Surrey*, 6 Q. B. D. 100; 50 L. J. M. C. 10; 43 L. T. 500.

The law regards the course of nature.

briefly to advert. First, it is a rule, that *lex spectat naturæ ordinem* (*d*), the law respects the order and course of nature, and will not force a man to demand that which he cannot recover (*e*). Thus, where the thing sued for by tenants in common is in its nature entire, as in a *quare impedit*, or in detinue for a chattel, they must of necessity join in the action, contrary to the rule which in other cases obtains, and according to which they must sue separately (*f*). Secondly, it is a maxim of our legal authors, as well as a dictate of common sense, that the law will not itself attempt to do an act which would be vain, *lex nil frustra facit*, nor to enforce one which would be frivolous—*lex nominem cogit ad vana seu inutilia*, —the law will not force any one to do a thing vain and fruitless (*g*).

Lex nil frustra facit.

IGNORANTIA FACTI EXCUSAT,—IGNORANTIA JURIS NON EXCUSAT. (*Gr. and Rud. of Law*, 140, 141.)—*Ignorance of fact excuses—ignorance of the law does not excuse* (*h*).

Rule derived from Roman law.

Ignorance may be either of law or of fact—for instance, if the heir is ignorant of the death of his ancestor, he is

(*d*) Co. Litt. 197, b.

(*e*) Litt. s. 129; Co. Litt. 197, b.

(*f*) Litt. s. 314; cited *Marson* v. *Short*, 2 Bing. N. C. 120; Co. Litt. 197, b.

"One tenant in common cannot be treated as a wrong-doer by another, except for some act which amounts to an ouster of his co-tenant, or to a destruction of the common property." *Per* Smith, J., *Jacobs* v. *Seward*, L. 4. C. P. 329, 330.

(*g*) *Per* Kent. C.J., 3 Johnson (U.S.), R. 598; 5 Rep. 21; Co. Litt. 127, b., cited 2 Bing. N. C. 121; Wing. Max., p. 600: *R.* v. *Bishop of London*, 13 East, 420 (a); *per* Willes, J., *Bell* v. *Midland R. C.*, 10 C. B. N. S. 306.

(*h*) "It is said *ignorantia juris haud excusat*, but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country." "When the

ignorant of a fact; but if, being aware of his death, and of his own relationship, he is nevertheless ignorant that certain rights have thereby become vested in himself, he is ignorant of the law (*i*). Such is the example given to illustrate the distinction between *ignorantia juris* and *ignorantia facti* in the Civil Law, where the general rule upon the subject is thus laid down: *Regula est, juris quidem ignorantiam cuique nocere facti vero ignorantiam non nocere* (*k*)—ignorance of a material fact may excuse a party from the legal consequences of his conduct; but ignorance of the law, which every man is presumed to know, does not afford excuse—*ignorantia juris, quod quisque scire tenetur, neminem excusat* (*l*). With respect to the "presumption of legal knowledge" here spoken of, we may observe, that, although ignorance of the law does not excuse persons, so as to exempt them from the consequences of their acts, as, for example, from punishment for a criminal offence (*m*), or damages for breach of contract, the law nevertheless takes notice that there may be a doubtful point of law, and that a person may be ignorant of the law, and it is quite evident that ignorance of the law does in reality exist (*n*). It

Meaning of rule.

word *jus* is used in the sense of denoting a private right, that maxim has no application." *Per* Lord Westbury, *Cooper* v. *Phibbs*, L. R. 2 H. L. 170.

(*i*) D. 22. 6. 1. The doctrines of the Roman law upon the subject treated in the text are shortly stated in 1 Spence's Chan. Juris. 632–3.

(*k*) D. 22. 6. 9 pr.; Cod. 1. 18. 10. The same rule is likewise laid down in the Basilica, 2. 4. 9. See Irving's Civil Law, 4th ed., 74.

(*l*) 2 Rep. 3, b; 1 Plowd. 343; *per* Lord Campbell, 9 Cl. & F. 324; *per* Erle, C.J., *Pooley* v. *Brown*, 11 C.B., N. S. 575; *Kitchin* v. *Hawkins*, L. R. 2 C. P. 22.

(*m*) *Post*, p. 261.

(*n*) "The maxim is *ignorantia legis neminem excusat*, but there is no maxim which says that for all intents and purposes a person must be taken to know the legal consequences of his acts." *Per* Lush, J., L. R. 3 Q. B. 639.

In reference to the equitable doctrine of election, Lord Westbury, C.,

would, for instance, be contrary to common sense to assert, that every person is acquainted with the practice of the Courts; although, in such a case, there is a presumption of knowledge to this extent, that *ignorantia juris non excusat*, the rules of practice must be observed, and any deviation from them will entail consequences detrimental to the suitor (*o*). It is, therefore, in the above qualified sense alone that the saying, that "all men are presumed cognisant of the law" (*p*), must be understood.

The following case decided by the House of Lords, will illustrate the above general rule, and will likewise show that our Courts must necessarily recognise the existence of doubtful points of law, since the adjustment of claims involving them is allowed to be a good consideration for a promise (*q*), and to sustain an agreement between the litigating parties:—The widow, brother, and sister, of an American who died in Italy, leaving considerable personal estate in the hands of trustees in Scotland, agreed, by advice of their law agent, to compromise their respective claims to the succession, by taking equal shares. The widow, after receiving her share, brought an action in Scotland to rescind the agreement, on the ground of

observes, that although "it is true as a general proposition that knowledge of the law must be imputed to every person," "it would be too much to impute knowledge of this rule of equity." *Spread* v. *Morgan*, 11 H. L. Cas. 602.

See also *Noble* v. *Noble*, L. R. 1 P. & D. 691, 693.

(*o*) See *per* Maule, J., *Martindale* v. *Falkner*, 2 C. B. 719, 720; cited *per* Blackburn, J., *Reg* v. *Mayor of Tewkesbury*, L. R. 3 Q. B. 635; *per* Willes, J., *Poole* v. *Whitcomb*, 12 C. B. N. S. 775; *per* Lord Mansfield, C.J., *Jones* v. *Randall*, 1 Cowp. 40; *per* Coltman, J., *Sargent* v. *Gannon*, 7 C. B. 752; *Edwards* v. *Ward*, 4 C. B. 315. See also *Newton* v. *Belcher*, 12 Q. B. 921; *Newton* v. *Lidiard*, *Id.* 925.

(*p*) Grounds and Rudiments of the Law, 141.

(*q*) *Per* Maule, J., 2 C. B. 720. See *Wade* v. *Simeon*, 1 C. B. 610.

having thereby sustained injury, through ignorance of her legal rights and the erroneous advice of the law agent: there was, however, no allegation of fraud against him or against the parties to the agreement. It was held, that although the fair inference from the evidence was, that she was ignorant of her legal rights, and would not have entered into the agreement had she known them, yet, as the extent of her ignorance and of the injury sustained was doubtful, and there was no proof of fraud or improper conduct on the part of the agent, she was bound by his acts, and affected by the knowledge which he was presumed to have of her rights, and was therefore not entitled to disturb the arrangement which had been effected (*r*).

"If," remarked Lord *Cottenham*, C., in the above case, "it were necessary to show knowledge in the principal, and a distinct understanding of all the rights and interests affected by the complicated arrangements which are constantly taking place in families, very few, if any, could be supported."

It is, then, a true rule, if understood in the sense above assigned to it, that every man must be taken to be cognisant of the law; for otherwise, as observed by Lord *Ellenborough*, C.J., there is no saying to what extent the excuse of ignorance might not be carried; it would be urged in almost every case (*s*); and, from this rule, coupled with that as to ignorance of fact, are derived the two following important propositions:—1st, that money paid with full knowledge of the facts, but through igno-

(*r*) *Stewart* v. *Stewart*, 6 Cl. & Fin. 911; *Clifton* v. *Cockburn*, 3 My. & K. 99; *vide* Cod. 1. 18. 2; *Teede* v. *Johnson*, 11 Exch. 840.

(*s*) *Bilbie* v. *Lumley*, 2 East, 469; Preface to Co. Litt.; *Gomery* v. *Bond*, 3 M. & S. 378.

rance of the law, is not generally recoverable, if there be nothing unconscientious in the retaining of it; and, 2ndly, that money paid in ignorance of the facts is recoverable, provided there have been no laches in the party paying it, and there was no ground to claim it in conscience (*t*).

Money paid with knowledge of facts.

Brisbane v. *Dacres.*

In a leading case on the first of the above rules, the facts were these—the captain of a king's ship brought home in her public treasure upon the public service, and treasure of individuals for his own emolument. He received freight for both, and paid over one-third of it, according to an established usage in the navy, to the admiral under whose command he sailed. Discovering, however, that the law did not compel captains to pay to admirals one-third of the freight, the captain brought an action for money had and received, to recover it back from the admiral's executrix; and it was held that he could not recover back the private freight, because the whole of that transaction was illegal; nor the public freight, because he had paid it with full knowledge of the facts, although in ignorance of the law, and because it was not against conscience for the executrix to retain it (*u*).

The following case may also here be noticed:—A.,

(*t*) See Note to *Marriot* v. *Hampton*, 2 Smith, L. C., 8th ed. 421, *et seq.*; *Wilkinson* v. *Johnston*, 3 B. & C. 429; *per* Lord Mansfield, C.J., *Bize* v. *Dickason*, 1 T. R. 286, 287; *Platt* v. *Bromage*, 24 L. J. Ex. 63. See *Lee* v. *Merrett*, 8 Q. B. 820, observed upon in *Gingell* v. *Purkins*, 4 Exch. 723, recognising *Standish* v. *Ross*, 3 Exch. 527.

(*u*) *Brisbane* v. *Dacres*, 5 Taunt. 143; *per* Lord Ellenborough, C.J., *Bilbie* v. *Lumley*, 2 East, 470; *Cumming* v. *Bedborough*, 15 M. & W. 438; *Bramston* v. *Robins*, 4 Bing. 11; *Stevens* v. *Lynch*, 12 East, 38; *per* Lord Eldon, C., *Bromley* v. *Holland*, 7 Ves. jun. 23; *Lowry* v. *Bourdieu*, Dougl. 468; *Gomery* v. *Bond*, 3 M. & S. 378; *Lothian* v. *Henderson*, 3 B. & P. 420; *Dew* v. *Parsons*, 2 B. & Ald. 562. See arg. *Gibson* v. *Bruce*, 6 Scott, N. R. 309; *Smith* v. *Bromley*, cited 2 Dougl. 696, and 6 Scott. N. R. 318; *Atkinson* v. *Denby*, 6 H. & N. 778; S. C., 7 *Id.* 934.

tenant to B., received notice from C., a mortgagee of B.'s term, that the interest was in arrear, and requiring payment to her (C.) of the rent then due. A., notwithstanding this notice, paid the rent to B. and was afterwards compelled, by distress, to pay the amount over again to C. Held, that the money having been paid to B. with full knowledge of the facts, could not be recovered back (*x*).

Mistake of fact.

Secondly, money paid by the plaintiff to the defendant under a *bonâ fide* forgetfulness or ignorance (*y*) of facts, which disentitled the defendant to receive it, may be recovered back as money had and received (*z*). The principle, it has been said (*a*), upon which the action for money had and received to recover money paid by mistake is maintainable, is clear and simple—"no man should by law be deprived of his money which he has parted with under a mistake, and where it is against justice and conscience that the receiver should retain it. If A. pay money to B. supposing him to be the agent of C., to whom he owes the money, and B. be not the agent, it may be recovered back again. If A. and B. are settling an account, and make a mistake in summing up the

(*x*) *Higgs* v. *Scott*, 7 C. B. 63. See *Wilton* v. *Dunn*, 17 Q. B. 294.

(*y*) D. 12. 6. 1.

(*z*) *Kelly* v. *Solari*, 9 M. & W. 54 (cited and distinguished *per* Erle, C.J., *Chambers* v. *Miller*, 13 C. B. N. S. 133); *Lucas* v. *Worswick*, 1 Moo. & Rob. 293; *Strickland* v. *Turner*, 7 Exch. 208; cited *per* Pollock, C.B., 8 Exch. 49; *Mills* v. *Alderbury Union*, 3 Exch. 590; *Barber* v. *Brown*, 1 C. B. N. S. 121.

"It seems from a long series of cases from *Kelly* v. *Solari* (*supra*), down to *Daile* v. *Lloyd*, 12 Q. B. 531, that where a party pays money under a mistake of fact he is entitled to recover it back, although he may at the time of the payment have had means of knowledge of which he has neglected to avail himself;" *per* Erle, C.J., *Townsend* v. *Crowdy*, 8 C. B. N. S. 493-4; *Stewart* v. *London and North Western R. C.*, 3 H. & C. 135.

(*a*) *Per* Kelly, C.B., *Freeman* v. *Jeffries*, L. R. 4 Ex. 197, 198.

items—A. pays B. £100 too much—he may recover it back again. But the law is different where money is paid with full knowledge of the facts (*b*).

Where, however, money is paid to another under the influence of a mistake existing between the person paying and the person receiving the money (*c*), that is upon the supposition that a specific fact is true, which, if true, would have rendered the person paying liable to pay the money (and not merely which, if true, would have rendered it desirable that he should pay it) (*d*); but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it (*e*), though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff, being a mere volunteer (*f*), or if the plaintiff mean to waive all inquiry into the fact (*g*), and that the person receiving shall have the money at all events whether it be true or false, the latter is certainly

(*b*) *Ante*, p. 250.

(*c*) *Pollard* v. *Bank of England*, L. R. 6 Q. B. 623; 40 L. J. Q. B. 233; 25 L. T. 415.

(*d*) *Aiken* v. *Short*, 1 H. & N. 215.

(*e*) See *Milnes* v. *Duncan*, 6 B. & C. 671; *Bize* v. *Dickason*, 1 T. R. 285; cited *per* Mansfield, C.J., *Brisbane* v. *Dacres*, 5 Taunt. 162; *Harris* v. *Lloyd*, 5 M. & W. 432. It is a good plea to an action on a promissory note that the note was obtained by a misrepresentation, whether of law or of fact: *Southall* v. *Rigg*, and *Forman* v. *Wright*, 11 C. B. 481, 492–3.

(*f*) See *Aiken* v. *Short*, 1 H. & N. 210. It is obvious that "if a person voluntarily pays money for another, he cannot sue the latter for it; in order to render him liable, it must be shown that there was a previous authority or an adoption of the payment;" *per* Martin, B., *Wycombe Union* v. *Eton Union*, 1 H. & N. 699.

(*g*) *Per* Willes, J., *Townsend* v. *Crowdy*, 8 C. B. N. S. 490.

entitled to retain it; but if it is paid under the impression of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence, or to inquire into the fact (*h*); and, therefore, it does not seem to be a true position in point of law, that a person so paying is precluded from recovering by laches in the sense of a mere omission to take advantage of knowledge in his power (*i*), though, if there be evidence of means of knowledge, the jury will very readily infer actual knowledge (*k*)

Presumption of knowledge.

In an action on a marine policy of insurance, the question was, whether the captain of a vessel which sailed to a blockaded port knew of the blockade at a particular period; and it was observed by Lord *Tenterden*, C.J., that, if the possibility or even probability of actual knowledge should be considered as legal proof of the fact of actual knowledge, as a *presumptio juris et de jure*, the presumption might, in some cases, be contrary to the fact, and such a rule might work injustice; and that the question, as to the knowledge possessed by a person of a given fact, was for the decision and judgment of the jury. It was also remarked, in the same case, that the probability of actual knowledge upon consideration of time, place, the opportunities of testimony, and other circumstances, may in some instances be so strong and cogent as to cast the

(*h*) *Per* Parke, B., *Kelly* v. *Solari*, 9 M. & W. 58, 59, recognised, *Bell* v. *Gardiner*, 4 Scott, N. R. 621, 633, 634; *per* Ashhurst, J., *Chatfield* v. *Paxton*, cited 2 East, 471, n. (*a*). See D. 22. 6. 9, § 2.

(*i*) *Per* Parke, B., 9 M. & W. 58, 59, controverting the dictum of Bayley, J., in *Milnes* v. *Duncan*, 6 B. & C. 671; *Townsend* v. *Crowdy*, 8 C. B. N. S. 477; *Lucas* v. *Worswick*, 1 Moo. & Rob. 293; *Bell* v. *Gardiner*, 4 Scott, N. R. 621, 635. See *per* Dallas, C.J., *Martin* v. *Morgan*, 1 B. & B. 291.

(*k*) *Per* Coltman, J., 4 Scott, N. R. 633.

proof of ignorance on the other side in the opinion of the jury, and, in the absence of such proof of ignorance, to lead them to infer knowledge; but that such inference properly belongs to them (*l*).

A policy of Insurance was granted by the defendants on the life of A., at a certain premium, payable on the 13th of October in each year,—with a condition that the policy should be void, *inter alia*, "if the premiums were not paid within thirty days after they should respectively become due, but that the policy might be revived within three calendar months on satisfactory proof of the health of the party on whose life the insurance was made," and payment of a certain fine. On the 13th of October, 1855, an annual premium became due, and on the 12th of November following A. died, the premium remaining unpaid, and the thirty days allowed by the condition having then expired. On the 14th of November the plaintiff for whose benefit the policy had been effected, sent the defendants a cheque for the premium, for which on the next day cash was obtained, and a receipt given as for "the premium for the renewal of the policy to October 13th, 1856, inclusive,"—both parties being ignorant that A. was then dead. The policy was held not to have been revived by the payment—the whole transaction, including such payment and receipt, having been "founded upon a mistake" (*m*).

Payments under mistake of fact when not recoverable.

The law raises no implied promise to repay money paid under a mistake of fact in cases where the rights of the receiver have been altered by the payment of the money, and his position would be prejudiced if he was compelled

(*l*) *Harratt* v. *Wise*, 9 B. & C. 712, 717.

(*m*) *Pritchard* v. *Merchants' Life Assurance Co.*, 3 C. B. N. S. 622.

to repay it (*n*); and this rule, it has been said, proceeds upon the ground of some mutual relation between the parties creating a duty on the part of the payer towards the receiver, the breach of which disentitles him from recovering, and therefore where no such duty exists the rule does not apply; thus, where the plaintiff had paid tithes according to notices served upon him by the defendants in ignorance that the amount specified in the notice included the tithes for lands not in his occupation, it was held he was entitled to recover back the tithes paid in respect of the land not occupied by him, although the defendants by lapse of time were precluded from suing the real occupier for the tithes in respect thereof (*o*).

Further, it has been stated (*p*) as a general rule, that "in matters connected with the administration of justice, where a mistake is discovered, before any further step is taken, the Court interferes to cure the mistake, taking care that the opposite party shall not be put to any expense in consequence of the application to amend the error." In some cases, also, where at the time of applying to the Court, the applicant is ignorant of circumstances material to the subject-matter of his motion, he may be permitted to open the proceedings afresh; for instance, under very peculiar circumstances the Court re-opened a rule for a criminal information, it appearing that the affidavits on which the rule had been discharged were false (*q*). And the Court will in furtherance of

(*n*) *Cox* v. *Masterman*, 9 B. & C. 902; *Clark* v. *Dickson*, E. B. & E. 148; *Freeman* v. *Jeffries*, L. R. 4 Ex. 189.

(*o*) *Durrant* v. *Ecclesiastical Commissioners*, 6 Q. B. D. 234; 50 L. J. Q. B. 30; 44 L. T. 348.

(*p*) *Per* Pollock, C.B., *Emery* v. *Webster*, 9 Exch. 242, 246, which well illustrates the proposition in the text.

(*q*) *R.* v. *Eve*, 5 A. & E. 780; *Bodfield* v. *Padmore*, *Id.* 785, n.

justice set aside a judgment in an action at the instance of a plaintiff on the ground of a mistake having been made by the plaintiff in the amount claimed and received, although the amount for which judgment was signed and the costs of the action have been paid (*r*).

Rule is true also in equity.

Formerly in Courts of equity, as well as of law, the two-fold maxim under consideration was admitted to hold true; for on the one hand it is a general rule, in accordance with the maxim of the civil law, *non videntur qui errant consentire* (*s*), that equity will relieve where an act has been done, or contract made, under a mistake, or ignorance of a material fact (*t*); and, on the other hand, it is laid down as a general proposition, that in Courts of equity ignorance of the law shall not affect agreements, nor excuse from the legal consequences of particular acts (*u*), subject to the qualification that the Courts would grant relief where the law is uncertain as arising upon the doubtful construction of a grant, but not in respect of ignorance of a well known and well settled rule or principle of law (*x*), and this rule, as observed by Mr. J. Story, is fully borne out by the authorities (*y*). Although a Court of equity would not, in general, relieve against a

(*r*) *Carman* v. *Reynolds*, 5 E. & B. 301.

(*s*) D. 50. 17. 116, § 2.

(*t*) 1 Story, Eq. Jurisp., 12th ed., 138. See *Scott* v. *Littledale*, 8 E. & B. 815; *Simmons* v. *Heseltine*, 5 C. B. N. S. 554, 565.

If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the agreement thus made is liable to be set aside in equity as having proceeded upon a common mistake; *Cooper* v. *Phibbs*, L. R. 2 H. L. 149, 170.

(*u*) 1 Fonbl. Eq., 5th ed., 119, note.

(*x*) *Beauchamp* v. *Winn*, L. R. 6 H. L. 234; 22 W. R. 193.

(*y*) 1 Story, Eq. Jurisp., 12th ed., 138. The case of *The Directors of the Midland Great Western R. C.* v. *Johnson*, 6 H. L. Cas. 798, illustrates the text.

mistake in a contract which was a mistake in law and not in fact (*z*), there are cases in which the Court did not hold itself strictly bound by this rule, and considered it had power to relieve against mistakes in law if there was any equitable ground which made it, under the particular facts of the case, inequitable that the party who had benefited by the mistake should retain that benefit (*a*); and the line between mistakes in law and mistakes in fact was not so sharply drawn in the old Court of Chancery as in the Courts of common law (*b*). The following are instances where the Courts of equity refused to relieve against a mistake in law; where a deed of appointment was executed absolutely, without introducing a power of revocation, which was contained in the deed creating the power, and this omission was made through a mistake in law, and on the supposition that the deed of appointment, being a voluntary deed, was therefore revocable, relief was refused by the Court (*c*). So, where two are jointly bound by a bond, and the obligee releases one, supposing, erroneously, that the other will remain bound, the obligee will not be relieved in equity upon the mere ground of his mistake of the law, for *ignorantia juris non excusat* (*d*). It is, however, well settled that a Court of equity will relieve against a mistake or ignorance of fact; and in several cases, which are sometimes cited as

(*z*) *The Directors of the Midland Railway Company of Ireland* v. *Johnson*, 6 H. L. 798.

(*a*) *Stone* v. *Godfrey*, 5 D. M. & G. 90; *Ex parte James, re Cowdon*, L. R. 9 Ch. 609; 43 L. J. Bank. 107; 30 L. T. 773; *Rogers* v. *Ingham*, 3 Ch. D. 351, 357; 46 L. J. Ch. 322; 35 L. T. 677.

(*b*) *Daniel* v. *Sinclair*, 6 App Cas. 181; 50 L. J. P. C. 50; 44 L. T. 257.

(*c*) *Worrall* v. *Jacob*, 3 Meriv. 256, 271.

(*d*) *Harman* v. *Cam*, 4 Vin. Abr. 387, pl. 3; 1 Fonbl. Eq., 5th ed., 119, note.

exceptions to the general rule as to *ignorantia juris*, it will be found that there was a mistake or misrepresentation of fact sufficient to justify a Court of equity in interfering to give relief (*e*). In a leading case (*f*), illustrative of this remark, the testator, being a freeman of the city of London, left to his daughter a legacy of 10,000*l*., upon condition that she should release her orphanage part together with all her claim or right to his personal estate, by virtue of the custom (*g*) of the city of London or otherwise. Upon her father's death, his daughter accepted the legacy, and executed the release, and, before executing it, her brother informed her that she had it in her election either to have an account of her father's personal estate, or to claim her orphanage part. Upon a bill afterwards filed by the husband of the daughter in her right against the brother, who was executor under the will, Lord *Talbot*, C., expressed an opinion (*h*) that the release should be set aside, and the daughter be restored to her orphanage share, which amounted to upwards of 40,000*l*. The decision thus expressed seems, in part, to have rested on the ground, that the daughter had not been informed of the actual amount to which she would be entitled under the custom, and did not appear to have known that she was entitled to have an account taken of the personal estate of her father, and that when she should be fully apprised of this, and not till then, she was to make her election; and it is a rule that a party is always entitled to a clear knowledge of the funds between which he is

(*e*) The reader is referred to 1 Story, Eq. Jurisp., 12th ed., Chap. V., p. 138, where the cases are considered.

(*f*) *Puscy* v. *Desbouvrie*, 3 P. Wms. 315. See also *M'Carthy* v. *Decaix*, 2 R. & M. 614.

(*g*) See Pulling, Laws and Customs of London, 180 *et seq.*

(*h*) The suit was compromised.

to elect before he is put to his election (*i*). In like manner, it has been held, in a recent case, which is frequently cited with reference to this subject, that, where a person agrees to give up his claim to property in favour of another, such renunciation will not be supported if, at the time of making it, he was ignorant of his legal rights and of the value of the property renounced, especially if the party with whom he dealt possessed, and kept back from him, better information on the subject (*k*).

Upon an examination, then, of the cases which have been relied upon as exceptions to the general rule (*l*) observed by Courts of equity, some, as in the instances above mentioned, may be supported upon the ground that the circumstances disclosed an ignorance of fact as well as of law, and in others there will be found to have existed either actual misrepresentation, undue influence, mental imbecility, or that sort of surprise which equity regards as a just foundation for relief. It is, indeed, laid down broadly that, if a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his property to another, under the name of a compromise, a Court of equity will grant relief; and this proposition may be illustrated by the case of an heir-at-law, who, knowing that he is the eldest son, nevertheless agrees, through ignorance of the law, to divide undevised

(*i*) 3 P. Wms. 321 (*x*).

(*k*) *M'Carthy* v. *Decaix*, 2 R. & M. 614; considered in *Warrender* v. *Warrender*, 2 Cl. & Fin. 488; *Smith* v. *Pincombe*, 3 Mac. & Gor. 653.

(*l*) Bearing upon the subject touched upon in the text, see *per* Sir J. Leach, *Cockerill* v. *Cholmeley*, 1 Russ. & My. 418, 424, 425; S. C., affirmed 1 Cl. & F. 60; and see S. C., 3 Russ. 565, where the facts are set out at length; *Marq. of Breadalbane* v. *Marq. of Chandos*, 2 My. & Cr. 711; S. C., 4 Cl. & F. 43.

fee-simple estates of his ancestor with a younger brother, such an agreement being one which would be held invalid by a Court of equity. Even in so simple a case, however, there may be important ingredients, independent of the mere ignorance of law, and this very ignorance may well give rise to a presumption of imposition, weakness, or abuse of confidence, which will give a title to relief; at all events, in cases similar to the above, it seems clear that the mistake of law is not, *per se*, the foundation of relief; but is only the medium of proof by which some other ground of relief may be established, and on the whole it may be safely affirmed that a mere naked mistake of law, unattended by special circumstances, will furnish no ground for the interposition of a Court of equity, and that the present disposition of such a Court is rather to narrow than to enlarge the operation of exceptions to the above rule (*m*).

Mistake of fact—when a ground to refuse specific performance.

As bearing on the subject under consideration, it may be observed that in cases where a purchaser seeks to avoid specific performance of a contract of purchase, on the ground of a mistake of fact, he can only do so provided he shows that the mistake was mutual to both parties; or that he has entered into the bargain under a mistake of fact which although not contributed to by the other party would inflict a hardship amounting to injustice if the Court held him to his bargain (*n*); or where the mistake was one to which the other party contributed, in other words if the party seeking relief was misled by any act of the vendor into making the bargain (*o*).

(*m*) See 1 Story, Eq. Jurisp., 12th ed., 131 *et seq.*; *per* Lord Cottenham, C., *Stewart* v. *Stewart*, 6 Cl. & Fin. 964–971. See also Spence, Chanc. Juris., 633 *et seq.*

(*n*) *Tamplin* v. *James*, 15 Ch. D. 215, 221; 43 L. T. 520.

(*o*) *Goddard* v. *Jeffries*, 51 L. J. Ch. 57.

Criminal cases.

In criminal cases the above maxim as to *ignorantia facti* applies when a man, intending to do a lawful act, does that which is unlawful. In this case there is not that conjunction between the deed and the will which is necessary to form a criminal act; but, in order that he may stand excused, there must be an ignorance or mistake of fact, and not an error in point of law; as if a man, intending to kill a thief or housebreaker in his own house, and under circumstances which would justify him in so doing, by mistake kills one of his own family, this is no criminal action; but if a man thinks he has a right to kill a person excommunicated or outlawed wherever he meets him, and does so, this is wilful murder. For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is, in criminal cases, no sort of defence (*p*). *Ignorantia eorum quæ quis scire tenetur non excusat* (*q*).

Lastly, every man is presumed to be cognisant of the statute law of this realm, and to construe it aright; and if any individual should infringe it through ignorance, he must, nevertheless, abide by the consequences of his error. It will not be competent to him, to aver, in a court of justice, that he has mistaken the law, this being a plea which no court of justice is at liberty to receive (*r*). Where, however, the passing of a statute could not have

(*p*) 4 Com. by Broom & Hadley, 26; Doct. and Stud., Dial. ii. c. 46. A plea of ignorance of the law was rejected in *Lord Vaux's case*, 1 Bulstr. 197. See also *Re Barronet*, 1 E. & B. 1, 8.

(*q*) Hale, Pl. Cr. 42. "The law is administered upon the principle that every one must be taken conclusively to know it without proof that he does know it;" *per* Tindal, C. J., 10 Cl. & F. 210.

(*r*) *Per* Sir W. Scott, *The Charlotta*, 1 Dods. R. 392; *per* Lord Hardwicke, *Middleton* v. *Croft*, Stra. 1056; *per* Pollock, C. B., *Cooper* v. *Simmons*, 7 H. & N. 717; *The Katherina*, 30 L. J., P. M. & A. 21.

been known to an accused at the time of doing an act thereby rendered criminal, the Crown would probably think fit, in case of conviction, to exercise its prerogative of mercy (*s*).

VOLENTI NON FIT INJURIA. (*Wing. Max.* 482.)—*That to which a person assents is not esteemed in law an injury.*

Consent on part of plaintiff will bar his right of action.

It is a general rule of the English law that no one can maintain an action for a wrong where he has consented to the act which occasions his loss (*t*); and this principle has often been applied under states of facts, showing that though the defendant was in the wrong, the plaintiff's negligence had contributed to produce the damage consequential on the act complained of (*u*). Cases such as now alluded to will hereafter be noticed in connection with the maxims *Sic utere tuo ut alienum non lædas* (*x*) and *Respondeat superior* (*y*).

In accordance with the rule *volenti non fit injuria*, in an action for criminal conversation, prior to the statute 20 & 21 Vict. c. 85, the law was clearly settled to be, that

(*s*) *R.* v. *Bailey*, Russ. & Ry. 1; *R.* v. *Esop*, 7 C. & P. 456.

(*t*) *Per* Tindal, C. J., *Gould* v. *Oliver*, 4 B. N. C. 142; cited S. C., 2 Scott, N. R., 257; *per* Lord Campbell, C. J., *Haddon* v. *Ayers*, 1 E. & B. 148; *per* Wood, V.C., *A.-G.* v. *College of Physicians*, 30 L. J., Chanc., 769. See *Bird* v. *Holbrook*, 4 Bing. 628, 639, 640; *Wootton* v. *Dawkins*, 2 C. B. N. S. 367; Plowd. 501; D. 50. 17. 203.

(*u*) *Per* Curtis, J., *Byam* v. *Bullard*, 1 Curtis (U. S.), R. 101. *Caswell* v. *Worth*, 5 E. & B. 849, and *Senior* v. *Ward*, 1 E. & E. 385, 393, well illustrate the text. See also *Holmes* v. *Clarke*, 6 H. & N. 349; *Adams* v. *Lancashire and Yorkshire R. C.*, L. R. 4 C. P. 739.

(*x*) *Post*, p. 347.

(*y*) *Post*, Law of Contracts.

the husband's consent to his wife's adultery went in bar of his action: if the husband were guilty of negligence, or even of loose or improper conduct not amounting to a consent, it only went in reduction of damages (*z*). And it is observable that the claim for "damages from any person, on the ground of his having committed adultery" with the wife of the petitioner, under s. 33 (*a*) of the Act just cited, is to be "heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation" were tried and decided in Courts of common law before the passing of that enactment (*b*).

Example of rule.

The following cases, involving dissimilar states of facts, will be found further to illustrate the maxim under consideration:—If a person says, generally, "There are spring-guns in this wood," and if another then takes upon himself to go into the wood, knowing that he is in hazard of meeting with the injury which the guns are calculated to produce, he does so at his own peril, and must take the consequences of his own act (*c*). Moreover, although, as will hereafter appear, the maxim *Injuria non excusat*

(*z*) *Per* Buller, J., *Duberley* v. *Gunning*, 4 T. R. 657; *per* De Grey, C.J., *Howard* v. *Burtonwood*, cited 1 Selw., N. P., 10th ed., 8, n. (3); *Id.* 10, n. (6); *per* Alderson, J., *Winter* v. *Henn*, 4 C. & P. 498. As to the application and meaning of the maxim, *Volenti non fit injuria*, in the ecclesiastical courts, see *per* Sir J. Nicholl, *Rogers* v. *Rogers*, 3 Hagg. 57; cited, *Phillips* v. *Phillips*, 1 Robertson, 158; *per* Sir W. Scott, *Forster* v. *Forster*, 1 Consist. R. 146; *Stone* v. *Stone*, 1 Robertson, 99; Judgm., *Cocksedge* v. *Cocksedge*, *Id.* 92; 2 Curt. 213; Shelf. on Marriage and Div., 445 *et seq.*

(*a*) See also ss. 28–30.

(*b*) See *Comyn* v. *Comyn*, 32 L. J., P. M. & A. 210; 3 Com. by Broom & Hadley, 411.

(*c*) *Per* Bayley, J., *Ilott* v. *Wilkes*, 3 B. & Ald. 311. And see *Lax* v. *Corporation of Darlington*, 5 Ex. D. 28, 35, 49; L. J. Ex. 105; 41 L. T. 489; *Woodley* v. *Metropolitan District Railway*, 2 Ex. D. 384; 46 L. J. Ex. 521.

injuriam is of frequent applicability, "a wrong-doer cannot, any more than one who is not a wrong-doer, maintain an action, unless he has a right to complain of the act causing the injury, and complain thereof against the person he has made defendant in the action" (*d*). No man by his wrongful act can impose a duty on another (*e*), nor can one who avails himself of a mere licence to enter upon premises impose upon their owner a duty to have them in a safe condition (*f*), but the owner would be responsible for a concealed danger on the premises in the nature of a trap which occasioned an injury to the plaintiff (*g*). If a man, passing in the dark along a foot-path, should happen to fall into a pit, dug by the owner of the adjoining field, in such a case, the party digging the pit would be responsible for the damage sustained if the pit were dug across the road; but if it were only in an adjacent field, the case would be very different, for the falling into it would then be the act of the injured party himself (*h*). But if a person chooses to use a private way without the leave of the owner, he uses it at his own risk,

(*d*) *Degg* v. *Midland R. C.*, 1 H. & N. 773, 780, followed in *Potter* v. *Faulkner*, 1 B. & S. 800; *Griffiths* v. *Gidlow*, 3 H. & N. 648; *Lygo* v. *Newbold*, 9 Exch. 302; *Skipp* v. *Eastern Counties R. C.*, 9 Exch. 223, 225; *Great Northern R. C.* v. *Harrison*, 10 Exch. 376; *Pardington* v. *South Wales R. C.*, 1 H. & N. 392; *Wise* v. *Great Western R. C.*, 1 H. & N. 63. And see *Cleveland* v. *Spier*, 16 C. B. N. S. 399.

(*e*) Judgm., 1 H. & N. 782.

(*f*) *Gautret* v. *Egerton*, L. R. 2 C. P. 371, with which compare *Indermaur* v. *Dames*, *Id.* 311.

(*g*) *Burchell* v. *Hickisson*, 50 L. J. Q. B. 101; *Ivay* v. *Hedges*, 9 Q. B. D. 80.

(*h*) Judgm., *Jordin* v. *Crump*, 8 M. & W. 787, 788; *Hardcastle* v. *South Yorkshire R. C.*, 4 H. & N. 67. See also *Horne* v. *Widlake*, Yelv. 141; cited and followed *per* Ruggles, C.J., *Hamilton* v. *White*, 1 Selden (U.S.), R. 12, 13. And see the cases hereafter cited in connection with *Jordin* v. *Crump*, *supra*, and *Barnes* v. *Ward*, 9 C. B. 392; with which *acc. Hadley* v. *Taylor*, L. R. 1 C. P. 53.

and therefore a builder of certain houses adjoining a new road which had not been dedicated to the public, and who had dug a trench across the road for the purpose of making drains, was held not liable to an action by one whose servant, without the builder's leave, drove along the road in the dark and, without negligence, drove into the trench and damaged the horse and conveyance (*i*).

Goods and passengers carried at their own risk.

A further illustration of the maxim is to be observed in those cases where goods or passengers are carried at the risk of the owner in the one instance, and at the risk of the passenger in the other. Without pausing to consider the authorities on the question of reasonableness of conditions under the Railway and Canal Traffic Act, 1854, it may be stated as a general rule that, if the owner of goods in consideration of paying a less rate of carriage, or a passenger in consideration of being carried under a free pass, agrees with a railway company that the risk during the transit shall be his, the company is not liable for any injury to the goods or passenger, caused during the transit by the negligence, however gross, of the company's servants. (*k*)

By a local Act, a right of appeal was given to any person thinking himself aggrieved by the order of commissioners appointed under it; one who had been present at a meeting and concurred in a resolution upon which the order appealed against was founded, was held disentitled to appeal against the order (*l*).

(*i*) *Morley* v. *Grove*, 46 J. P. 360.

(*k*) *Macauley* v. *The Furness R. C.*, L. R. 8 Q. B. 57; 42 L. J. Q. B. 4; 27 L. T. 485; *Lewis* v. *Great Western R. C.*, 3 Q. B. D. 195; 47 L. J. Q. B. 131; 37 L. T. 774; and see *Brown* v. *Manchester, Sheffield, & Lincolnshire R. C.*, 8 App. Cas. 703; S. C., 9 Q. B. D. 230.

(*l*) *Harrup* v. *Bayley*, 6 E. & B. 224.

In addition to the above and similar decisions, there is as already intimated, an extensive class of cases illustrating the maxim *Volenti non fit injuria*, in which redress is sought for an injury which has resulted from negligence of both plaintiff and defendant, and in many of which it has been held, that the former is precluded from recovering damages (*m*).

Voluntary payment.

Another important application of the maxim in question, is to cases in which money which has been voluntarily paid is sought to be recovered, on the ground that it was not, in fact, due.

The first rule which we shall notice in reference to cases of this description, is that where a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought to have paid, he cannot recover it back again in an action for money had and received. Thus, if a man pay a debt, which could have been barred by pleading the statute of limitations, or one contracted during infancy, which, in justice, he ought to discharge, in these cases, though the law would not have compelled payment, yet, the money being paid, it will not oblige the payee to refund it (*n*).

There is also a large class of cases in which it has been held, that the money paid voluntarily cannot be recovered, although the original payment was not required by any equitable consideration; and these cases are very nearly allied in principle to those which have been considered in treating of a payment made in ignorance of the law.

Thus, if a tenant pays property-tax assessed on the

(*m*) See remarks on the maxim *Sic utere tuo ut alienum non lædas*, *post*.

(*n*) *Per* Lord Mansfield, C.J., *Bize* v. *Dickason*, 1 T. R. 286, 287; *Farmer* v. *Arundel*, 2 W. Bla. 824.

premises, and omits to deduct it in his next payment of rent, he cannot afterwards recover the amount as money paid to the use of the landlord (*o*).

Money paid for an illegal or immoral purpose—when recoverable.

There are cases in which money voluntarily paid to another for a particular purpose which is either illegal, immoral, or against public policy, can be recovered back as money had and received to the use of the payer. Thus, money paid to a person to effect an illegal purpose or upon an immoral consideration can be recovered back before, but apparently not after, the purpose is effected or the contract executed (*p*); and money deposited with a third person to abide the event of a race between two horses can before the race is decided be recovered back from the stakeholder by the payer (*q*).

Compulsory payment.

The maxim under consideration holds, however, in those cases only where the party has a freedom of exercising his will; and therefore, where a debtor from mere necessity, occasioned, for instance, by a wrongful detainer of goods, pays more than the creditor can in justice demand, he shall not be said to pay it willingly, and has a right to recover the surplus so paid (*r*). So, likewise, may money paid to recover possession of goods wrongfully detained (*s*),

(*o*) *Cumming* v. *Bedborough*, 15 M. & W. 438; *Franklin* v. *Carter*, 1 C. B. 750. See *Payne* v. *Burridge*, 12 M. & W. 727; *Sweet* v. *Seager*, 2 C. B. N. S. 119 (distinguished in *Tidswell* v. *Whitworth*, L. R. 2 C. P. 326); *Thompson* v. *Lapworth*, L. R. 3 C. P. 149, 160; *Denby* v. *Moore*, 1 B. & Ald. 128; cited, *per* Bayley, J., *Stubbs* v. *Parsons*, 3 B. & Ald. 518.

(*p*) *Wilson* v. *Strugnell*, 7 Q. B. D. 548; 50 L. J. M. C. 145; 45 L. T. 218.

(*q*) *Trimble* v. *Hill*, 5 App. Cas. 342.

(*r*) See *per* Lord Mansfield, C. J., *Smith* v. *Bromley*, cited, Dougl. 696, and followed in *Atkinson* v. *Denby*, 6 H. & N. 778; S. C., 7 *Id.* 934; *per* Patteson, J., and Coleridge, J., *Ashmole* v. *Wainwright*, 2 Q. B. 845, 846, which case is commented on, *Parker* v. *Bristol and Exeter R. C.*, 6 Exch. 704, 706.

(*s*) *Oates* v. *Hudson*, 6 Exch. 346. See *Kearns* v. *Durell*, 6 C. B. 596.

or under pressure of an extortionate demand, *colore officii* (*t*), be recovered.

All the cases, indeed, upon this subject, show, that where a party is in, claiming under legal process, the owner of the goods contending that the possession is illegal, and paying money to avert the evil and inconvenience of a sale, may recover it back in an action for money had and received, if the claim turns out to have been unfounded.

Where, on the contrary, money is voluntarily paid, with full knowledge of all the facts (*u*), or where a party pays the money, *intending to give up his right*, he cannot afterwards bring an action for money had and received, though it is otherwise where, at the time of paying the money, the party gives notice that he intends to resist the claim, and that he yields to it merely for the purpose of relieving himself from the inconvenience of having his goods sold (*x*).

Close v. *Phipps*.

In *Close* v. *Phipps* (*y*) the attorney for a mortgagee, who had advertised a sale of the mortgaged property, under the power reserved to him, for non-payment of interest, having extorted from the administratrix of the mortgagor money exceeding the sum really due for principal, interest, and costs, under a threat that he would proceed with the sale unless his demands were complied

(*t*) *Steele* v. *Williams*, 8 Exch. 625; *Traherne* v. *Gardner*, 5 E. & B. 913; *Re Coombs*, 4 Exch. 839, 841.

(*u*) *Remfry* v. *Butler*, E. B. & E. 887, 897, followed in *Stray* v. *Russell*, 1 E. & E. 905, 911; S. C., *Id.* 916; *Chapman* v. *Shepherd*, *Whitehead* v. *Izod*, L. R. 2 C. P. 228, 238; *Barber* v. *Pott*, 4 H. & N. 759.

(*x*) *Per* Tindal, C.J., *Valpy* v. *Manley*, 1 C. B. 602, 603.

(*y*) 8 Scott, N. R., 381; recognising *Parker* v. *Great Western R. C.*, 7 M. & Gr. 253. See 1 C. B. 788, 798.

with, it was held, that the administratrix might recover back the money so paid as money had and received to her use. "The interest of the plaintiff," observed *Tindal*, C.J., "to prevent the sale, by submitting to the demand was so great, that it may well be said, the payment was made under what the law calls a species of duress."

Astley v. *Reynolds.*

The plaintiff having, in the month of August, pawned some goods with the defendant for 20*l.*, without making any agreement for interest, went in the October following to redeem them, when the defendant insisted on having 10*l.*, as interest for the 20*l.* The plaintiff tendering him 20*l.* and 4*l.* for interest, knowing the same to be more than the legal interest amounted to, the defendant still insisted on having 10*l.* as interest; whereupon the plaintiff, finding that he could not otherwise get his goods back, paid defendant the sum which he demanded, and brought an action for the surplus beyond the legal interest as money had and received to his use. The Court held, that the action would well lie, for it was a payment by compulsion (*z*).

In connection with cases such as the foregoing, it may be well to add that "the compulsion of law which entitles a person paying the debt of another to recover against that other as for money paid, is not such a compulsion of law as would avoid a contract, like imprisonment." Restraint of goods, by reason of the non-payment of a debt due by one to another, is sufficient compulsion of the law to entitle a person who has paid the debt, in order to relieve his goods from such restraint, to sustain a claim

(*z*) *Astley* v. *Reynolds*, Stra. 915; *Parker* v. *Bristol and Exeter R. C.*, 6 Exch. 702; *Hills* v. *Street*, 5 Bing. 37; *Bosanquet* v. *Dashwood*, Cas. temp. Talbot, 38.

for money paid (*a*). On payment of a sum of money which another has promised to pay, as where a bill of exchange is accepted for the accommodation of the drawer, the acceptor, if sued on default of the drawer to pay, is entitled to recover against the latter for money paid to his use (*b*); but a drawer who voluntarily pays the holder of a bill which he had drawn and indorsed for the accommodation of the acceptor without any notice of dishonour or request from the acceptor to pay it cannot sue the latter for money paid (*c*). On the same principle, where a railway company, by a general arrangement with carriers, in consideration of such carriers loading, unloading, and weighing the goods forwarded by them, made a deduction in their favour of 10*l.* per cent. from the charges made to the public at large for the carriage of goods, it was decided that the plaintiff, a carrier, who, although willing to perform the above duties, was excluded from participation in the said arrangement, was entitled to recover from the company the above percentage, as well as other sums improperly exacted from him by the company, such payments not having been made voluntarily, but in order to induce the company to do that which they were bound to do without them, and for the refusal to do which an

(*a*) Judgm., *Johnson* v. *Royal Mail Steam Packet Co.*, L. R. 3 C. P. 44–5, where the following state of facts is put *per Cur.* "A. lends B. his horse for a limited period, which would imply that he must pay the expense of the horse's keep during the time he retains it. B. goes to an inn and runs up a bill which he does not pay, and the innkeeper detains the horse. In the meantime A. has sold the horse out-and-out for its full price to C., and C. is informed that the horse is at the inn; he proceeds there to take him away, but is told he cannot take him until he pays the bill, and he pays the bill accordingly and gets his horse. Can C., who in order to get his horse is obliged to pay the debt of another, sue that other in an action for money paid? We are clearly of opinion that he could."

(*b*) *Driver* v. *Benton*, 17 Q. B. 989.

(*c*) *Sleigh* v. *Sleigh*, 3 Ex. 514.

action on the case (*d*) might have been maintained against them (*e*). And an action will lie against a railway company which, being bound by its special Act to charge rates equally to all, detains or refuses to carry parcels of a particular person until he pays an unreasonable charge (*f*).

An action for money had and received lies to recover back money which has been obtained through compulsion, although it has been received by defendant acting for a principal and has been paid over by him, unless the money were paid to the agent expressly for the use of the principal (*g*).

Payment under fraudulent legal process.

In another class of cases which necessarily fall under present consideration, it has been decided, that money may be recovered back if paid under compulsion of law, imposed upon defendant by the fraudulent practices of the plaintiff in the original proceedings, or if the payment be made under the compulsion of colourable legal process. For instance, plaintiff, being a foreigner, ignorant of the English language, was arrested by the defendant for a fictitious debt of 10,000*l.* upon a writ, which was afterwards set aside for irregularity. Plaintiff, in order to obtain his release, agreed in writing to pay 500*l.*, and to give bail for the remainder of the sum. The 500*l.* was to be as a payment in part of the writ, and both parties were to abide the event of the action, the agree-

Duke de Cadaval v. *Collins.*

(*d*) *Pickford* v. *Grand Junction R. C.*, 10 M. & W. 399. See *Kent* v. *Great Western R. C.*, 3 C. B. 714.

(*e*) *Parker* v. *Great Western R. C.*, 7 M. & Gr. 253; cited, *per* Williams, J., *Kearns* v. *Durell*, 6 C. B. 602, and *per* Cresswell, J., *Devaux* v. *Conolly*, 8 C. B. 657.

(*f*) *Sutton* v. *Great Western R. C.*, L. R. 4 H. L. 226; *Gidlow* v. *Lancashire and Yorkshire R. C.*, L. R. 7 H. L. 517.

(*g*) *Snowdon* v. *Davis*, 1 Taunt. 359; *Parker* v. *Bristol and Exeter R. C.*, 6 Exch. 702, 707; *Steel* v. *Williams*, 8 Exch. 625.

ment containing no provision for refunding the money if the action should fail. The 500*l.* was accordingly paid, and an action having been brought to recover it back, the jury found for the plaintiff, and that the defendant knew that he had no claim upon the plaintiff. The Court of Queen's Bench discharged a rule for a new trial or to enter a non-suit, on the ground that the arrest, according to the finding of the jury, was fraudulent, and that the money was parted with under the arrest to get rid of the pressure (*h*): it being a true position that, "if an undue advantage be taken of a person's situation, and money be obtained from him by compulsion, such money may be recovered in an action for money had and received" (*i*).

The authorities above cited will sufficiently establish the position, that money paid under compulsion of fraudulent legal process, or of wrongful pressure exercised upon the party paying it, may, in general, be recovered back, as money had and received to his use; and it therefore only remains to add, that, *à fortiori*, money will be recoverable which is paid, and that an instrument may be avoided which is executed, under threats of personal violence, duress, or illegal restraint of liberty (*k*); and this is in strict accordance with the maxims laid down

(*h*) *Duke de Cadaval* v. *Collins*, 4 A. & E. 858. See *Smith* v. *Monteith*, 13 M. & W. 427; *De Medina* v. *Grove*, 10 Q. B. 152, 172.

(*i*) *Per* Coleridge, J., 4 A. & E. 867; *Pitt* v. *Combes*, 2 A. & E. 459; *per* Gibbs, J., *Brisbane* v. *Dacres*, 5 Taunt. 156; *Jendwine* v. *Slade*, 2 Esp. 573; *Follett* v. *Hoppe*, 5 C. B. 226; *Green* v. *Laurie*, 1 Exch. 335.

(*k*) See *De Mesnil* v. *Dakin*, L. R. 3 Q. B. 18; *Clark* v. *Woods*, 2 Exch. 395; *Skeate* v. *Beale*, 11 A. & E. 983, 990; *Wakefield* v. *Newbon*, 6 Q. B. 276, 280. As to what may constitute duress, see *per* Lord Cranworth, C., *Boyse* v. *Rossborough*, 6 H. L. Cas. 45: *Cumming* v. *Ince*, 11 Q. B. 112; *Powell* v. *Hoyland*, 6 Exch. 67; *Edward* v. *Trevellick*, 4 E. & B. 59.

by Lord *Bacon: Non videtur consensum retinuisse si quis ex præscripto minantis aliquid immutavit* (*l*), and *corporalis injuria non recipit æstimationem de futuro* (*m*).

Intentional wrong-doer.

Lastly, it is worthy of observation, that there are cases where an intentional wrong-doer will be, to a certain extent, protected by the law through motives of public policy. Thus, a horse with a rider on him cannot be distrained damage feasant, on the ground of the danger to the peace which might result if such a distress were levied; and, therefore, to a plea in trespass, justifying the taking of a horse, cart, and other chattels, damage feasant, it is a good replication that the horse, cart, and chattels were, at the time of the distress, in the actual possession and under the personal care of, and then being used by, the plaintiff (*n*).

NULLUS COMMODUM CAPERE POTEST DE INJURIA SUA PROPRIA. (*Co. Litt.* 148 *b.*)—*No man can take advantage of his own wrong.*

Rule stated.

It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong (*o*); and

(*l*) Bac. Max., reg. 22; *post: Nil consensui tam contrarium est quàm vis atque metus*, D. 50. 17. 116.

(*m*) Bac. Max., reg. 6.

(*n*) *Field* v. *Adames*, 12 A. & E. 649, and cases there cited; *Storey* v. *Robinson*, 6 T. R. 138; *Bunch* v. *Kennington*, 1 Q. B. 679, where Lord Denman, C.J., observes, that "perhaps the replication in *Field* v. *Adames* was rather loose." See *Gaylard* v. *Morris*, 3 Exch. 695; *Sunbolf* v. *Alford*, 3 M. & W. 248.

(*o*) *Per* Lord Abinger, C.B., *Findon* v. *Parker*, 11 M. & W. 680; *Daly* v. *Thompson*, 10 M. & W. 309; *Malins* v. *Freeman*, 4 Bing., N. C., 395, 399; *per* Best, J., *Doe* d. *Bryan* v. *Bancks*, 4 B. & Ald. 409.

this maxim, which is based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure. The reasonableness and necessity of the rule being manifest, we shall proceed at once to show its practical application by reference to decided cases; and, in the first place, we may observe, that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law (*p*)—*frustra legis auxilium quæ*rit *qui in legem committit* (*q*);—and, therefore, A. shall not have an action of trespass against B., who lawfully enters to abate a nuisance caused by A.'s wrongful act (*r*), nor shall an executor, *de son tort*, obtain that assistance which the law affords to a rightful executor (*s*). So if A., on whose goods a distress has been levied, by his own misconduct prevent the distress from being realised, A. cannot complain of a second distress as unlawful (*t*). So B., into whose field cattle have strayed through defect of fences, which he was bound to repair, cannot distrain such cattle damage feasant in another field, into which they have got by breaking through a hedge which had been kept by him in good repair, because B.'s negligence

Examples.

Co. Litt. 148 b.; Jenk. Cent. 209; 2 Inst. 713; D. 50. 17. 134, § 1.

"No man is allowed to take advantage of his own wrong; far less of his wrong intention which is not expressed;" *per* Willes, J., *Rumsey* v. *North Eastern R. C.*, 14 C. B. N. S. 653.

It "is contrary to all legal principle" that "the plaintiff can take advantage of his own wrong." *Per* Willes, J., *Ames* v. *Waterlow*, L. R. 5 C. P. 55.

See also *Dean, &c., of Christchurch* v. *Duke of Buckingham*, 17 C. B. N. S. 391.

(*p*) 1 Hale, P. C. 482.

(*q*) 2 Hale, P. C. 386.

(*r*) Dodd. 220, 221. See *Perry* v. *Fitzhowe*, 8 Q. B. 757.

(*s*) See *Carmichael* v. *Carmichael*, 2 Phill. 101; *Paull* v. *Simpson*, 9 Q. B. 365.

(*t*) *Lee* v. *Cooke*, 3 H. & N. 203; S. C., 2 *Id.* 584.

was *causa sine quâ non* of the mischief (*u*). So if a man be bound to appear on a certain day, and before that day the obligee put him in prison, the bond is void (*x*).

Hyde v. *Watts* (*y*) is strikingly illustrative of the maxim, that a man shall not be permitted to take advantage of his own wrong. That was an action of debt for work and labour, to which the defendant pleaded a release under an indenture or trust deed for the benefit of such of his creditors as should execute the same. The replication set out the indenture *in hæc verba*, by which it appeared that the defendant covenanted, *inter alia*, to insure his life for 1500*l.*, and to continue the same so insured during a period of three years; and, in case of his neglect or refusal to effect or to keep on foot this insurance, the indenture was to be utterly void to all intents and purposes whatsoever:—breach, that the defendant did not insure his life, whereby the said indenture became utterly void. The material question in the above case was, whether the deed, in case of a neglect on the part of the defendant to effect or keep alive the policy for 1500*l.*, was absolutely void, and incapable of being confirmed as to *all* parties, or only void as against the plaintiff, who was a party to the deed, if he should so elect; and the latter was held by the Court of Exchequer to be the true construction, by reason of the absurd consequences which would follow, if the defendant, against the consent of all other parties interested in the validity of the indenture, could avail himself of his own wrong, and thus absolve himself

(*u*) *Singleton* v. *Williamson*, 7 H. & N. 410.

(*x*) Noy, Max., 9th ed., p. 45; Arg. *Williams* v. *Gray*, 9 C. B. 737.

(*y*) 12 M. & W. 254, and cases cited, *Id.* 262, 263.

and the trustees from liability on their respective covenants.

The cases of *Weir* v. *Barnett* (*z*), and *Weir* v. *Bell* (*a*), are illustrative of the subject before us. There the question was whether directors, acting on behalf of the company of which they were directors, were liable for the acts of their sub-agents in issuing a fraudulent prospectus. The Exchequer Division and the Court of Appeal held that the directors were not liable, but on different grounds. *Cockburn*, C. J., in delivering the judgment of himself and *Brett*, L. J., in the Court of Appeal, considered that although, as a general rule, an agent is not responsible for the acts of a sub-agent employed by him, yet if the latter in the course of his employment is guilty of fraud or misrepresentation, and the agent, with knowledge of the fraud, derives a material benefit from it, the case becomes analogous to that of a principal who profits by the fraud of his agent; because he who profits by the fraud of one who is acting by his authority, though committed without his authority, adopts the act of the agent and becomes responsible to the party who has been imposed upon, and has sustained damage by reason of it (*b*). The learned judge then proceeds to state that as it was shown that the defendant had not derived any benefit from the fraud, on that ground he was not liable to the plaintiff.

Landlord and tenant.

The following instances, may also serve further to illustrate the same general principle:—If tenant for life or years fell timber-trees, they will belong to the lessor; for the tenant cannot, by his own wrongful act, acquire a greater

(*z*) 3 Ex. D. 32.

(*a*) 3 Ex. D. 238; 47 L. J. Ex. 704; 38 L. T. 929.

(*b*) See also *per* Lord Coleridge, *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301, at pp. 312-13.

property in them than he would otherwise have had (*c*). Where the lessee is evicted from part of the lands demised, by title paramount, he will have to pay a rateable proportion for the remainder (*d*); whereas if he be evicted from part of the lands by his landlord, no apportionment, but a suspension of the whole rent, takes place, except in the case of the king; and there is no suspension, if the eviction has followed upon the lessee's own wrongful act, as for a forfeiture, but an apportionment only (*e*). And it is a well-known rule, that a lessor or grantor cannot dispute, with his lessee or grantee, his own title to the land which he has assumed to demise or convey (*f*). Nor can a grantor derogate from his own grant (*g*).

Default in performance of contract.

It is moreover a sound principle, that he who prevents a thing being done, shall not avail himself of the non-performance he has occasioned. Hence, in an action for breach of covenant in not insuring, the tenant may defend himself by showing that the landlord prevented him from insuring, by representing that he had himself insured, and that, in fact, the covenant had not been broken, if such representation were true (*h*). Where an agreement for the purchase of a medical practice, and

(*c*) Wing. Max., p. 574.

(*d*) *Smith* v. *Malings*, Cro. Jac. 160. See *The Mayor of Poole* v. *Whitt*, 15 M. & W. 571; *Selby* v. *Browne*, 7 Q. B. 632.

(*e*) *Walker's case*, 3 Rep. 22; Wing. Max., p. 569. See *Boodle* v. *Cambell*, 8 Scott, N. R. 104.

(*f*) Judgm., *Doe* d. *Levy* v. *Horne*, 3 Q. B. 766; cited *per* Alderson, B., 15 M. & W. 576.

(*g*) 2 Shepp. Touchst. by Preston, 286. As to the canons of construction applicable to grants by the Crown, see *Att.-Gen.* v. *Evelme Hospital*, 17 Beav. 366; 22 L. J. Ch. 846; and between private individuals, *Booth* v. *Alcock*, L. R. 8 Ch. App. 663; 42 L. J. Ch. 557; 29 L. T. 231; *Taylor* v. *Corporation of St. Helens*, 6 Ch. D. 264; 46 L. J. Ch. 857; 37 L. T. 253.

(*h*) See Judgm., *Doe* d. *Musters* v. *Gladwin*, 6 Q. B. 963.

the mode of making the stipulated payments for it implied that the business was to be carried on by the purchaser for a certain period, he was held liable for breach of contract in having, by his wilful default during such period, incapacitated himself from carrying on the business (*i*).

An insurance company covenanted with A. for valuable consideration to appoint him their agent at G., together with B., and that if B. should be displaced from the agency, they would pay A. a certain sum; the company, having transferred their business to another company, and wound up their affairs and dissolved themselves, were held to have displaced A. within the meaning of the covenant (*k*). But where two parties mutually agree for a fixed period, the one to employ the other as his sole agent in a certain business at a certain place, the other that he will act in that business for no other principal at that place, there is no implied condition that the business itself shall continue to be carried on during the period named (*l*).

Tender.

Again, where a creditor refuses a tender sufficient in amount, and duly made, he cannot afterwards, for purposes of oppression or extortion, avail himself of such refusal; for, although the debtor still remains liable to pay whenever required so to do, yet the tender operates in bar of any claim for damages and interest for not paying or for detaining the debt, and also of the costs of an action brought to recover the demand (*m*).

(*i*) *M'Intyre* v. *Belcher*, 14 C. B. N. S. 654.

(*k*) *Stirling* v. *Maitland*, 5 B. & S. 840, 853; citing *Charnley* v. *Winstanley*, 5 East, 266.

(*l*) *Rhodes* v. *Forwood*, 1 App. Cas. 256; 47 L. J. Ex. 396; 34 L. T. 890.

(*m*) *Vide per* Williams, J., *Smith* v. *Manners*, 5 C. B. N. S. 636.

Confusion of goods.

According to the same principle, if articles of unequal value are mixed together, producing an article of a different value from that of either separately, and, through the fault of the person mixing them, the other party cannot tell what was the original value of his property, he must have the whole (*n*). "At law," remarks Lord *Redesdale*, in *Bond* v. *Hopkins* (*o*), "fraud destroys rights—if I mix my corn with another's he takes all (*p*); but if I induce another to mix his corn with mine, I cannot then insist on having the whole, the law in that case does not give me his corn." So, where the plaintiff, pretending title to hay standing in defendant's land, mixed some of his own with it, it was held that the defendant thereby became entitled to the hay (*q*). And where a malting agent, by his conduct and representations, induced his principals to believe that certain barley which he had upon his premises was purchased by him for them, and thereby induced his principals to make him payments from time to time to cover the price of the barley, but, as a matter of fact, a portion only of the barley had been purchased by him for his principals, which he had mixed with his own so that the two portions could not be separately distinguished, the agent having become bankrupt, his trustee claimed to hold the whole of the barley against the principals on the ground that the part purchased for the principals could not be identified out of the bulk, but

(*n*) *Per* Lord Eldon, C., *Lupton* v. *White*, 15 Ves. 442. See *Colwill* v. *Reeves*, 2 Camp., N. P. C., 575; *Warde* v. *Eyre*, 2 Bulstr. 323.

(*o*) 1 Scho. & Lefr. 433.

(*p*) In *Aldridge* v. *Johnson*, 7 E. & B. 899, Lord Campbell, C.J., observes, "Where the owner of such articles as oil or wine mixes them with similar articles belonging to another, that is a wrongful act by the owner for which he is punished by losing his property."

(*q*) Popham, 38, pl. 2.

it was held that he was not so entitled, as no man can take advantage of his own wrong (*r*).

By the mixture of bales of cotton on board ship, and their becoming undistinguishable by reason of the action of the sea, and without the fault of their respective owners, these parties become tenants in common of the cotton in proportion to their respective interests; but such a result would follow in those cases only where, after the adoption of all reasonable means and exertions to identify or separate the goods, it has been found impracticable to do so (*s*).

Again, where a party is sued by a wrong name, and suffers judgment to go against him, without attempting to rectify the mistake, he cannot afterwards, in an action against the sheriff for false imprisonment, complain of an execution issued against him by that name (*t*), and, if a bond, or any other instrument, is executed under an assumed name, the obligor, or party executing it, is bound thereby in the same manner as if he had executed it in his true name (*u*). "So, if a man, having an opportunity of seeing what he is served with, wilfully abstains from looking at it, that is virtually a personal service" (*x*); and, where one of the litigating parties takes a step after having had notice that a rule has been obtained to set aside the proceedings, he does so in his own wrong, and the step taken subsequently to notice will be set aside (*y*).

(*r*) *Harris* v. *Truman*, 7 Q. B. D. 340; 9 Q. B. D. 964; 51 L. J. Q. B. 338; 46 L. T. 844, C. A.

(*s*) *Spence* v. *Union Marine Ins. Co.*, L. R. 3 C. P. 427. See *Webster* v. *Gower*, L. R. 2 P. C. 69.

(*t*) *Fisher* v. *Magnay*, 6 Scott, N. R. 588; *Morgan* v. *Bridges*, 1 B. & Ald. 647. See *De Mesnil* v. *Dakin*, L. R. 3 Q. B. 18; *Kelly* v. *Lawrence*, 3 H. & C. 1.

(*u*) 13 Peters (U. S.), R. 428. See Judgm., *Trueman* v. *Loder*, 11 A. & E. 594–5.

(*x*) *Per* Tindal, C.J., *Emerson* v. *Brown*, 8 Scott, N. R., 222.

(*y*) *Per* Pollock, C.B., *Tiling* v. *Hodgson*, 13 M. & W. 638.

A party cannot take advantage of his own fraud.

The foregoing examples have been selected, in order to show in what manner the rule, which they will serve to illustrate, has been applied to promote the ends of justice, in various and dissimilar circumstances. The maxim under review applies also with peculiar force to that very extensive class of cases in which fraud is alleged to have been committed by one of the parties to a transaction, and is relied upon as a defence by the other. We do not, in this treatise, propose to consider in what manner formerly a Court of equity dealt with fraud, nor how, if fraud were proved, it interfered to give relief: but we may state the principle which that Court invariably acted upon, namely—that the author of wrong, who has put a person in a position in which he had no right to put him, shall not take advantage of his own illegal act, or, in other words, shall not avail himself of his own wrong (*z*).

Statute of Limitations —concealed fraud.

When an action is brought more than six years after the cause of action has arisen, and which therefore, under ordinary circumstances, would be barred by the Statute of Limitations, it is a good answer to a plea setting up the statute as a defence, that the plaintiff did not discover and had not reasonable means of discovering the cause of action within six years before action brought, and that the existence of such cause of action was fraudulently concealed by the defendant until within such six years (*a*). And it is a good defence to an action brought on a foreign judgment that the same was obtained by fraud, which defence was good in the old Courts of law as well as in equity (*b*).

(*z*) *Per* Lord Cottenham, C., *Hawkins* v. *Hall*, 4 My. & Cr. 281.

(*a*) *Gibbs* v. *Guild*, 9 Q. B. D. 59; 51 L. J. Q. B. 313; 46 L. T. 248, C. A.

(*b*) *Ochsenbein* v. *Papelier*, L. R. 8 Ch. App. 695; 42 L. J. Ch. 861; 28 L. T. 459.

Twyne's case. In a leading case on this subject (*c*), the facts were, that A. was indebted to B. in 400*l.*, and was indebted also to C. in 200*l.*; C. brought an action of debt against A., and, pending the writ, A., being possessed of goods and chattels of the value of 300*l.*, in secret made a general deed of gift of all his goods and chattels, real and personal, whatsoever, to B., in satisfaction of his debt, but nevertheless remained in possession of the said goods, some of which he sold; he also shore the sheep, and marked them with his own mark. Afterwards C. obtained judgment, and issued a *fi. fa.* against A., and the question arose, whether the above gift was, under the circumstances, fraudulent and of no effect, by virtue of the statute 13 Eliz. c. 5; and it was determined, for the following reasons, that the gift was fraudulent within the statute:—1st, this gift has the signs and marks of fraud, because it is general, without excepting the wearing-apparel, or other necessaries of the party making it; and it is commonly said, that *dolosus versatur in generalibus* (*d*)—a person intending to deceive deals in general terms; a maxim, we may observe, which has been adopted from the civil law, and is frequently cited and applied in our Courts (*e*); 2ndly, the donor continued in possession and used the goods as his own, and by reason thereof he traded and

(*c*) *Twyne's case*, 3 Rep. 80 (with which compare *Evans* v. *Jones*, 3 H. & C. 423); *Graham* v. *Furber*, 14 C. B. 410, 418; *Tarleton* v. *Liddell*, 17 Q. B. 390; *Fermor's case* (3 Rep. 77), is also a leading case to show that the Courts will not sustain or sanction a fraudulent transaction. In that case it was held, that a fine fraudulently levied by lessee for years should not bar the lessor; and see the law on this subject stated *per* Tindal, C.J., in *Davies* v. *Lowdnes*, 5 Bing., N. C., 172. See also *Wood* v. *Dixie*, 7 Q. B. 892.

(*d*) Wing. Max. 636; 2 Rep. 34; 2 Bulstr. 226; 1 Roll. R. 157; Moor, 321; *Mace* v. *Cammel*, Lofft, 782.

(*e*) *Presbytery of Auchterarder* v. *Earl of Kinnoull*, 6 Cl. & Fin. 698, 699; *Spicot's case*, 5 Rep. 58.

trafficked with others, and defrauded and deceived them (*f*); 3rdly, the gift was made in secret, and *dona clandestina sunt semper suspiciosa* (*g*)—clandestine gifts are always open to suspicion; 4thly, it was made pending the writ; 5thly, in this case, there was a trust between the parties, for the donor possessed the goods and used them as his own, and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud; and 6thly, the deed states, that the gift was made honestly, truly, and *bonâ fide*, and *clausulæ inconsuetæ semper inducunt suspicionem*—unusual clauses always excite suspicion.

In the foregoing case, it will be observed, that the principal transaction was invalidated on the ground of fraud, according to the principle, that a wrongful or fraudulent act shall not be allowed to conduce to the advantage of the party who committed it; *nul prendra advantage de son tort demesne* (*h*).

Estoppe *in pais.*

The doctrine of estoppel *in pais*, which has in many recent cases been applied, is obviously referable to the principle set forth in the maxim before us, and has been defined as follows:

If a man, by his words or conduct, wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things and acts upon his belief, he who knowingly made the false statement is estopped from

(*f*) Cited *per* Lord Mansfield, C.J., *Worseley* v. *Demattos*, 1 Burr. 482; *Martindale* v. *Booth*, 3 B. & Ad. 498. See this subject considered in the Note to *Twyne's case*, 1 Smith, L. C., 8th ed., 1; arg. *Wheeler* v. *Montefiore*, 2 Q. B. 138.

(*g*) Noy, Max., 9th ed., p. 152; *Latimer* v. *Batson*, 4 B. & C. 652; *per* Lord Ellenborough, C.J., *Leonard* v. *Baker*, 1 M. & S. 253.

(*h*) 2 Inst. 713; Branch, Max., 5th ed., p. 141.

averring afterwards that such a state of things did not exist at the time: again, if a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts: and thirdly, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he, with such belief, does act in that way to his damage, the first is estopped from denying that the facts were as represented (*i*).

It has, in accordance with this principle of estoppel *in pais*, been laid down that if a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, the real owner will not afterwards be allowed to assert his title to the land so as to deprive the stranger of the buildings erected by him (*k*).

The cases illustrative of the doctrine of estoppel *in pais* are numerous, and reference here can only be made to a few of the leading authorities on the subject. In *Pickard* v. *Sears* (*l*), which was an action of trover, it

(*i*) *Carr* v. *London and North Western Railway Co.*, L. R. 10 C. P. 307; 44 L. J. C. P. 109; 31 L. T. 785; *M'Kenzie* v. *British Linen Co.*, 6 App. Cas. 82; 44 L. T. 431; *Pickard* v. *Sears*, 6 A. & E. 469.

(*k*) *Ramsden* v. *Dyson*, L. R. 1 H. L. 129.

(*l*) 6 A. & E. 469.

appeared that the goods in question were seized while in the actual possession of a third party, under an execution against such third party, and sold to the defendant; it further appeared that no claim had been made by the plaintiff after the seizure, and that the plaintiff had consulted with the execution creditor as to the disposal of the property without mentioning his own claim after he knew of the seizure and of the intention to sell the goods: it was held that a jury might properly infer from the plaintiff's conduct that he had authorised the sale and had in point of fact ceased to be the owner. In *Gregg* v. *Wells* (*m*), it was held that the owner of goods, who stands by, and voluntarily allows another to treat them as his own, whereby a third person is induced to buy them *bonâ fide*, cannot recover them from the vendee. "A party," says the Lord Chief Justice, "who negligently or culpably stands by, and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving."

The principle on which the foregoing cases were decided has been well explained in the case of *Freeman* v. *Cooke* (*n*), and the expression, "where one by his words or conduct wilfully causes another to believe the existence of a certain state of things," in *Pickard* v. *Sears* is stated to mean, "if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon

(*m*) 10 A. & E. 90, 98. See *Doe* d. *Groves* v. *Groves*, 10 Q. B. 486; *Nickells* v. *Atherstone*, *Id.* 944, 949.

(*n*) 2 Exch. 654, 663–4, and see *Miles* v. *McIlwraith*, 8 App. Cas. 120, where the statement of the law in the text is expressly approved by Lord Blackburn.

accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the fact in the usual mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being so authorised. * * * In truth, in most cases to which the doctrine in *Pickard* v. *Sears* is to be applied, the representation is such as to amount to the contract or licence of the party making it" (*o*).

An important limitation to the doctrine of estoppel *in pais* was laid down by the House of Lords in *Gordon* v. *Mony* (*p*), namely, that there must be a misrepresentation of existing facts, and not of a mere intention; this distinction was recognised and approved of in the *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (*q*), and is illustrated in a recent case, where the plaintiff had given a bill of sale over his goods to the defendant as security for money advanced; the loan was

(*o*) *Vide per* Lord Chelmsford, C., 6 H. L. Cas. 656. See also in illustration of the text, *Martyn* v. *Gray*, 14 C. B. N. S. 824; *Stephens* v. *Reynolds*, 5 H. & N. 513; *Gurney* v. *Evans*, 3 *Id.* 122; *Summers* v. *Solomon*, 7 E. & B. 879; *Ramazotti* v. *Bowring*, 7 C. B. N. S. 857; *Castellani* v. *Thompson*, 13 C. B. N. S. 105, 121-2. As to the liability of sleeping partners see *Pooley* v. *Driver*, 5 Ch. D. 458.

(*p*) 5 H. L. Cas. 185.

(*q*) L. R. 6 H. L. 352; 43 L. J. Ch. 269; 22 W. R. 194.

to be repaid by instalments, and the bill of sale authorised the defendant at any time to seize and take possession of the goods. The plaintiff having paid certain of the instalments, asked for time to pay the rest, and the defendant gave him a week, but on the third day, without any default in the plaintiff, the defendant seized the goods; it was held he had a perfect right to do so, as the defendant's promise was not a misstatement as to existing facts, and was not founded on any consideration, and so was not binding on him (*r*).

Allegans contraria non est audiendus.

Furthermore, a person who has expressly made a verbal representation, on the faith of which another has acted, shall not afterwards be allowed to contradict his former statement, in order to profit by that conduct which it has induced (*s*). Whenever an attempt is made in the course of legal proceedings to violate this principle, the law replies in the words of a maxim which we have already cited (*t*), *allegans contraria non est audiendus*, and, by applying the doctrine of estoppel therein contained, prevents the unjust consequences which would otherwise ensue (*u*). We may, therefore, lay it down as a general rule, applicable alike in law and equity, that a party shall not entitle himself to substantiate a claim, or to enforce a defence, by reason of acts or misrepresentations which

(*r*) *Williams* v. *Stern*, 5 Q. B. D. 409.

(*s*) *Trickett* v. *Tomlinson*, 13 C. B. N. S. 663.

(*t*) *Ante*, p. 169. See also *Cannam* v. *Farmer*, 3 Exch. 698; *Hallifax* v. *Lyle*, *Id.* 446; *Money* v. *Jorden*, 21 L. J. Chanc. 531; *Fairhurst* v. *Liverpool Adelphi Loan Association*, 9 Exch. 422; *Standish* v. *Ross*, 3 Exch. 527; *Freeman* v. *Steggall*, 14 Q. B. 202; *Morgan* v. *Couchman*, 14 C. B. 100; *Dunston* v. *Paterson*, 2 C. B. N. S. 495.

(*u*) *Price* v. *Carter*, 7 Q. B. 838; *Reg.* v. *Mayor of Sandwich*, 10 Q. B. 563, 571; *Banks* v. *Newton*, 11 Q. B. 340; *Petch* v. *Lyon*, 9 Q. B. 147, and cases there cited; *Braithwaite* v. *Gardiner*, 8 Q. B. 473. See *Dresser* v. *Bosanquet*, 4 B. & S. 460, 486.

proceeded from himself, or were adopted or acquiesced in by him after full knowledge of their nature and quality (*x*): and further, that where misrepresentations have been made by one of two litigating parties, in his dealings with the other, a Court of law will either decline to interfere, or will so adjust the equities between the plaintiff and defendant, as to prevent an undue advantage from accruing to that party who is unfairly endeavouring to take advantage of his own wrong (*y*).

If, therefore, the acceptor of a bill of exchange at the time of acceptance *knew* the payee to be a fictitious person, he shall not take advantage of his own fraud; but a *bonâ fide* holder may recover against him on the bill, and declare on it as payable to bearer (*z*): and, generally, a person will not be allowed as plaintiff in a Court of law to rescind his own act, on the ground that such act was a fraud on another person, whether the party seeking to do this has sued in his own name or jointly with such other person (*a*).

Further remarks.

Further, we may remark that the maxim which precludes a man from taking advantage of his own wrong is, in principle, very closely allied to the maxim, *Ex dolo malo*

(*x*) *Vigers* v. *Pike*, 8 Cl. & Fin. 562.

(*y*) See *Harrison* v. *Ruscoe*, 15 M. & W. 231, where an unintentional misrepresentation was made in giving notice of the dishonour of a bill; *Rayner* v. *Grote*, *Id.* 359, where an agent represented himself as principal (citing *Bickerton* v. *Burrell*, 5 M. & S. 383); *Humble* v. *Hunter*, 12 Q. B. 310; *Schmaltz* v. *Avery*, 16 Q. B. 655; *Cox* v *Hubbard*, 4 C. B. 317, 319; *Cooke* v. *Wilson*, 1 C. B. N. S. 153.

(*z*) *Gibson* v. *Minet* (in error), 1 H. Bla. 569.

(*a*) *Per* Lord Tenterden, C.J., *Jones* v. *Yates*, 9 B. & C. 538; *Sparrow* v. *Chisman*, *Ib.* 241; *Wallace* v. *Kelsall*, 7 M. & W. 264; which cases are recognised, *Gordon* v. *Ellis*, 8 Scott, N. R. 305; *Brandon* v. *Scott*, 7 E. & B. 234; *Husband* v. *Davis*, 10 C. B. 645. See *Heilbut* v. *Nevill*, L. R. 4 C. P. 354.

non oritur actio, which is likewise of very general application, and will be treated of more conveniently hereafter in the Chapter upon Contracts. The latter maxim is, indeed, included in that above noticed; for it is clear, that since a man cannot be permitted to take advantage of his own wrong, he will not be allowed to found any claim upon his own iniquity—*Nemo ex proprio dolo consequitur actionem*; and, as before observed, *frustra legis auxilium quærit qui in legem committit* (*b*).

Principal maxim, how qualified.

Nevertheless, the principal maxim under our notice, and likewise the kindred rule, *Fraus et dolus nemini patrocinari debent* (*c*), are sometimes qualified in operation by the maxim cited at a former page (*d*),—*Quod fieri non debet factum valet* (*e*). "Fraud," as observed (*f*), "renders any transaction voidable at the election of the party defrauded; and if, when it is avoided, nothing has occurred to alter the position of affairs, the rights and remedies of the parties are the same as if it had been void from the beginning; but if any alteration has taken place, their rights and remedies are subject to the effect of that alteration." This may be illustrated by *Reg.* v. *The Saddlers' Company* (*g*), where the facts were as under:—By the charter of the Saddlers' Company, the warden and assistants were empowered to elect assistants from the freemen,

(*b*) The following cases also illustrate the maxim, that a man shall not be permitted to take advantage of his own wrong or default; respecting the right to costs, *Pope* v. *Fleming*, 5 Exch. 249; the enrolment of memorial of an annuity, *Molton* v. *Camroux*, 4 Exch. 17; S. C., 2 Exch. 487; an action against the sheriff for an escape, *Arden* v. *Goodacre*, 11 C. B. 371, 377.

(*c*) 3 Rep. 78, b.

(*d*) *Ante*, p. 175.

(*e*) Cited *per* Martin, B., and Wilde, B., 6 H. & N. 787, 792.

(*f*) *Per* Blackburn, J., 10 H. L. Cas. 420–1; citing *Clarke* v. *Dickson*, E. B. & E. 148; and *Feret* v. *Hill*, 15 C. B. 207.

(*g*) 10 H. L. Cas. 404.

and to remove any for ill-conduct, or other reasonable cause, and to make such by-laws as should seem to them salutary and necessary for the good government of the body in general and its officers. A by-law was duly made in these terms, "that no person who has been a bankrupt or become otherwise insolvent, shall hereafter be admitted a member of the court of assistants, unless it be proved to the satisfaction of the Court that such person, after his bankruptcy or insolvency, has paid his creditors in full," &c. D. being otherwise qualified, but being in insolvent circumstances, and unable to pay his creditors twenty shillings in the pound, was elected an assistant, and after his election, of which he was not aware, but before his admission, he made to the agents of the wardens and assistants a statement, false to his own knowledge, that he was solvent; he was then admitted, and exercised the office of assistant. The by-law, as above stated, being adjudged good, it was further held, that the mere statement of a falsehood by D. did not nullify his election, and that D. could not be legally removed from his office by the wardens and assistants of the company without being heard in his defence (*h*).

In *Hooper* v. *Lane* (*i*), which strikingly illustrates the rule that "no man shall take advantage of his own wrong," various instances are put by a learned judge (*k*), exemplifying that the rule in question "only applies to the extent of undoing the advantage gained, where that can be done, and not to the extent of taking away a right previously possessed." The instances ad-

(*h*) See the maxim, *Audi alteram partem*, *ante*, pp. 106–9.

(*i*) 6 H. L. Cas. 443; *Ockford* v. *Freston*, and *Chapman* v. *Freston*, 6 H. & N. 466, 472, 480, 481.

(*k*) Bramwell, B., 6 H. L. Cas. 461.

duced are as under:—"If A. lends a horse to B., who uses it, and puts it in his stable, and A. comes for it, and B. is away and the stable locked, and A. breaks it open and takes his horse, he is liable to an action for the trespass to the stable; and yet the horse could not be got back, and so A. would take advantage of his own wrong. So, though a man might be indicted at common law for a forcible entry, he could not be turned out if his title were good. So, if goods are bought on a promise of cash payment, the buyer, on non-payment, is subject to an action, but may avail himself of a set-off and the goods cannot be gotten back. So, if I promise a man I will sell him more goods on credit if he pays what he already owes, and he does so, and I refuse to sell, I may retain the money. So, if I force another from a fishing-ground at sea, and catch fish, the fish are mine."

The maxim, moreover, acccording to the opinion of the learned judge whose words have been above cited, "is never applicable where the right of a third party is to be affected. * * Can one man by his wrongful act to another deprive a third of his right against that other? * * A. obtains goods from B. under a contract of sale, procured by A. from B. by fraud. A. sells to C.; C. may retain the goods (*l*). Surely A. might recover the price from C. at which he sold to him; yet he would in so doing take advantage of his own wrong. So, if my lessee covenants at the end of his term to deliver possession to me, and in order to do so forcibly evicts one to whom he had sub-let for a longer term, and I take possession without notice surely I can keep it; at least, at the common law I could. So, if a sub-lessee at an excessive rent purposely omits to

(*l*) *White* v. *Garden*, 10 C. B. 919.

perform a covenant, the performance of which would be a performance of the lessee's covenant to his lessor, and by such non-performance the lessee's covenant is broken, and the first lessor enters and avoids the lease and evicts the sub-lessee, the sub-lessee may defend himself against a claim for rent by his lessor (*m*); yet there he takes advantage of his own wrong, because of the right of the third person. So, if I sell goods, the property not to pass till payment or tender, and the vendee has a week in which to pay, and during that week I resell and deliver to a third person, no action is maintainable against me as for a detention or conversion, but only for non-delivery; yet there I take advantage of my own wrong, because the right of a third party has accrued" (*n*).

And upon the same principle of protecting the rights of third parties acquired *bonâ fide* under a fraudulent transaction, a shareholder in a company who has been induced to take shares by the fraud of the company cannot avoid the contract and have his name removed from the register after an order for the winding up of the company has been made, nor after a petition for winding up has been presented on which an order is subsequently made (*o*), because of the intervening rights of the creditors accruing under the order.

(*m*) *Logan* v. *Hall*, 4 C. B. 598.

(*n*) *Per* Bramwell, B., 6 H. L. Cas. 461-2.

(*o*) *Oakes* v. *Turquand*, L. R. 2 H. L. 325; 36 L. J. C. P. 949; Leake on Contracts, 400; *Holdsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317.

ACTA EXTERIORA INDICANT INTERIORA SECRETA. (8 *Rep.* 291.)—*Acts indicate the intention* (*p*).

The Six Carpenters' case.

The law, in some cases, judges of a man's previous intentions by his subsequent acts; and, on this principle, it was decided in a well-known case, that, if a man abuse an authority given him *by the law*, he becomes a trespasser *ab initio* (*q*), but that, where he abuses an authority given him *by the party*, he shall not be a trespasser *ab initio*. The reason assigned for this distinction being, that, where a general authority or licence is given by the law, the law judges by the subsequent act *quo animo*, or to what intent the original act was done; but when the party himself gives an authority or licence to do anything, as to enter upon land, he cannot for any subsequent cause convert that which was originally done under the sanction of his own authority or licence into a trespass *ab initio*; and, in this latter case, therefore, the subsequent acts only will amount to trespasses (*r*).

For instance, the law gives authority to enter into a common inn or tavern; in like manner to the owner of the ground to distrain damage feasant (*s*); and to the commoner to enter upon the land to see his cattle. But, if he who enters into the inn or tavern commits a trespass,

(*p*) The remarks in illustration of the maxim *Actus non facit reum nisi mens sit rea* (*post*, p. 300), should be read in connection with those which immediately follow.

(*q*) See *North* v. *London and South Western R. C.*, 14 C. B. N. S. 132.

(*r*) *The Six Carpenters' case*, 8 Rep. 290; *per* Erle, J., *Ambergate, &c., R. C.* v. *Midland R. C.*, 23 L. J. Q. B. 17, 20. See *Jacobsohn* v. *Blake*, 6 M. & Gr. 919; *Peters* v. *Clarson*, 7 M. & Gr. 548; *Webster* v. *Watts*, 11 Q. B. 311; Wing. Max., p. 108.

(*s*) See *Layton* v. *Hurry*, 8 Q. B. 811; *Gulliver* v. *Cosens*, 1 C. B. 788.

or if the owner who distrains a beast damage feasant works or kills the distress, or if the commoner cuts down a tree, in these and similar cases the law adjudges that the party entered for the specific purpose of committing the particular injury, and because the act which demonstrates the intention is a trespass, he shall be adjudged a trespasser *ab initio* (*t*); or, in other words, the subsequent illegality shows the party to have contemplated an illegality all along, so that the whole becomes a trespass (*u*). For the same reason a custom to seize a heriot is an authority given by the law, and an abuse of it renders the party making the seizure a trespasser *ab initio* (*x*); and if a sheriff continues in possession after the return day of the writ, this irregularity makes him a trespasser *ab initio* (*y*).

One consequence of the above doctrine, as to the abuse of an authority given by law, was, that, if a party entering lawfully (*z*) to make a distress committed any subsequent abuse, he became a trespasser *ab initio*; and, as this was found to bear hard on landlords, it was enacted by stat. 11 Geo. 2, c. 19, s. 19 (*a*), that, where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party dis-

11 Geo. 2, c. 19, s. 19.

(*t*) 8 Rep. 291; Wing. Max., p. 109; *Oxley* v. *Watts*, 1 T. R. 12; *Bagshaw* v. *Goward*, Cro. Jac. 147; *Aitkenhead* v. *Blades*, 5 Taunt. 198.

(*u*) *Per* Littledale, J., *Smith* v. *Egginton*, 7 A. & E. 176; distinguished in *Moone* v. *Rose*, L. R. 4 Q. B. 486, 492. See *Taylor* v. *Cole*, 3 T. R. 292.

(*x*) *Price* v. *Woodhouse*, 1 Exch. 559.

(*y*) *Aitkenhead* v. *Blades*, 5 Taunt. 198. See *Ash* v. *Dawnay*, 8 Exch. 237; *Percival* v. *Stamp*, 9 Exch. 167; cited *post*.

(*z*) Where the entry is effected in an unlawful manner, trespass of course lies. See *Attack* v *Bramwell*, 3 B. & S. 520.

(*a*) See also stat. 2 W. & M. c. 5; Judgm., *Thompson* v. *Wood*, 4 Q. B. 498; *Rodgers* v. *Parker*, 18 C. B. 112.

training, or his agent, the distress shall not be deemed unlawful, nor the distrainer a trespasser *ab initio*, but the party grieved may recover satisfaction for the damage in a special action of trespass, or on the case (*b*) at the election of the plaintiff, and if he recover he shall have full costs. Where a landlord distrained for rent, amongst other things, goods which were not distrainable in law, he was held to be a trespasser *ab initio* as to those particular goods only (*c*).

17 Geo. 2, c. 38, s. 8.

Also by stat. 17 Geo. 2, c. 38, s. 8, where any distress shall be made for money justly due for the relief of the poor, the party distraining shall not be deemed a trespasser *ab initio*, on account of any act subsequently done by him; but the party grieved may recover satisfaction for the special damage in an action of trespass, or on the case, with full costs, unless tender of amends is made before action brought.

Implied licence.

With respect to the second proposition laid down in the *Six Carpenters' case, viz.*, that the abuse of authority or licence given by the party will not make a person a trespasser *ab initio*, it should be observed that such a licence to do an act which *per se* would be a trespass, is in some cases implied by law. Thus, all the old authorities say that, where a party places upon his own close the goods of another, he, by so doing, gives to the owner of them an implied licence to enter for the purpose of recaption (*d*). If a man takes my goods, and carries them into

(*b*) See *Winterbourne* v. *Morgan*, 11 East, 395, 401; *Etherton* v. *Popplewell*, 1 East, 139.

(*c*) *Harvey* v. *Pocock*, 11 M. & W. 740, with which compare *Price* v. *Woodhouse*, 1 Exch. 559. As to the effect of ratification by the landlord of the act of the bailiff, see *Lewis* v. *Read*, 13 M. & W. 834, and cases cited, *post*, Chap. IX.

(*d*) *Per* Parke, B., *Patrick* v. *Colerick*, 3 M. & W. 485; acc. *Burridge* v. *Nicholetts*, 6 H. & N. 383, 388, 392; 2 Roll. R. 565, pl. 54.

his own land, I may justify my entry into the said land to take my goods again, for they came there by his own act (*e*). So, a man may sometimes justify an entry on his neighbour's land to retake his own property which has by accident been removed thither; as in the instance of fruit falling into the ground of another, or in that of a tree which is blown down, or, through decay, falls into the ground of a neighbour: in these cases, the owner of the fruit or of the tree may, by his plea, show the nature of the accident, and that he was not responsible for it, and thus justify the entry (*f*). This distinction must, however, be remarked, that, if the fruit or tree had fallen in the particular direction in consequence of the owner's act or negligence, he could not justify the entry (*g*).

Another case also occurs, in which the law presumes a licence. Thus, if A. wrongfully place goods in B.'s building, B. may lawfully go upon A.'s close adjoining the building, for the purpose of removing and depositing the goods there for A.'s use: that is to say, the law allows a person to enter into a plaintiff's own close, for the purpose of depositing there the plaintiff's own goods, which he had wrongfully placed on the premises of the defendant (*h*). So, also, if a man finds cattle trespassing on his land, he may chase them out, and is not bound to distrain them damage feasant (*i*). And if a distrainor takes the dis-

(*e*) Vin. Abr., "*Trespass*" (1), a; cited 3 M. & W. 485, and arg. *Williams* v. *Roberts*, 7 Exch. 626. See *Earl of Bristol* v. *Wilsmore*, 1 B. & C. 514, which also illustrates the rule that "fraud vitiates a contract:" *post*, Chap. IX.

(*f*) *Per* Tindall, C.J., *Anthony* v. *Haney*, 8 Bing. 192.

(*g*) *Millen* v. *Hawery*, Latch. 13; Vin. Abr., "*Trespass*," H. a 2, L. a; *per* Tindall, C.J., 8 Bing. 192.

(*h*) Vin. Abr., "*Trespass*," 516, pl. 17 (l. a.); Roll. Abr. I. pl. 17, p. 566; cited Judgm., *Rea* v. *Sheward*, 2 M. & W. 426.

(*i*) *Tyringham's case*, 4 Rep. 38; cited 2 M. & W. 426.

tress out of the place where it was originally impounded, and misuses it, the owner may re-take his property without rendering himself liable for a rescue or pound-breach (*k*).

Where, however, the goods are placed on the ground or premises of a third party, the common law is different; for, if individuals were allowed to use private force as a remedy for private injuries, the public peace would be endangered, and, therefore, the right of recaption shall never be exerted where such exertion must occasion strife and bodily contention (*l*). If, for instance, my horse is taken away, and I find him on a common, in a fair, or at a public inn, I may, it is said, lawfully seize him to my own use, but I cannot justify breaking open a private stable, or entering on the grounds of a third person to take him, unless he be feloniously stolen (*m*). Nevertheless, if A. take chattels out of the actual possession of B., and against his will, B. might justify using force sufficient to defend his right, and retake the chattels (*n*).

Lastly, it was resolved in the principal case, that a mere *non-feasance* will not make a man a trespasser *ab initio* (*p*). Non-feasance.

(*k*) *Smith* v. *Wright*, 6 H. & N. 821.

(*l*) "The law of England appears to me, both in spirit and in principle, to prevent persons from redressing their grievances by their own act;" *per* Pollock, C.B., *Hyde* v. *Graham*, 1 H. & C. 598.

(*m*) 3 Com. by Broom & Hadley, 4–5; *per* Parke, B., 3 M. & W. 485; *per* Tindall, C.J., and Park, J., 8 Bing. 192, 193: 2 Roll. R. 55, 56, 208; 6 M. & Gr. 1056 (a). As to entering on the land of another to search for goods stolen, see 2 Roll. R. 565, pl. 15; *Webb* v. *Beavan*, 7 Scott, N. R. 936.

(*n*) *Blades* v. *Higgs*, 11 H. L. Cas. 621.

Secus if the property in the chattels had become vested in A., *Chambers* v. *Miller*, 13 C. B. N. S. 125.

(*p*) 8 Rep. 290; *West* v. *Nibbs*, 4 C. B. 172, 187. See *Gardner* v.

RES IPSA LOQUITUR (*the thing speaks for itself*).

In some cases where the liability of the defendant depends upon proof of negligence, the question not unfrequently arises whether the mere fact of the happening of an accident is, in itself, evidence of negligence to be left to a jury. *Bovill*, C. J., in *Simpson* v. *The London General Omnibus Company* (*q*), is reported to have said that the happening of an accident is not as a general rule *primâ facie* evidence of negligence, but if the cause of the accident be shown, it may or may not, according to the circumstances, be evidence.

Where the plaintiff was lawfully passing under a doorway on the defendant's premises, some bags of sugar fell on him from a crane which was fixed over the doorway, the Court of Exchequer Chamber held that, in the absence of any evidence on the part of the defendants explanatory of the cause of the accident, there was evidence of negligence on the part of the defendants' servants to go to the jury, on the ground that where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care (*r*); similarly, where the plaintiff was passing along a highway under a railway bridge of the defendant's, which was a girder bridge resting

Campbell, 15 Johnson (U. S.), R. 401; *Jacobsohn* v. *Blake*, 6 M. & Gr. 919.

(*q*) L. R. 8 C. P. 390, 392; 42 L. J. C. P. 112; 28 L. T. 560.

(*r*) *Scott* v. *London Dock Company*, 3 H. & C. 596; 34 L. J. (Ex.) 220.

on a perpendicular brick wall with pilasters, a brick fell from the top of one of the pilasters on which a girder rested and injured the plaintiff, it was held that the fact of the brick falling without any explanation offered by the Company might reasonably lead the jury to the inference that its looseness was due to some carelessness on the part of the defendants, against whom consequently damages might be assessed (*s*).

On the other hand it has been held that the mere fact of a horse bolting without any explainable cause is no evidence of negligence to go to a jury (*t*). In that case a distinction was drawn between animate creatures and inanimate things, the Court holding the decision in *Hammack* v. *White* (*u*) to be good law with regard to the former. An animal being the creature of impulse, it is equally probable, in the absence of all evidence one way or the other, that it bolted of its own will as that the cause of its running away was due to some act of negligence in the driver, but in the case of a falling bale of goods, it is a fair presumption that it would not have fallen had it been properly and carefully placed. It would seem, therefore, in the case of inanimate things, if the happening of the event is such as would not happen in the ordinary course of events, if those who have the management of the thing use proper care, that affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care; but

(*s*) *Kearney* v. *London, Brighton, &c., R. C.*, L. R. 5 Q. B. 411; 6 Q. B. 759; 40 L. J. Q. B. 285; 24 L. T. 913. See also *Pearson* v. *Cox*, 2 C. P. D. 369; 36 L. T. 495, C. A.; *Manzoni* v. *Douglas*, 6 Q. B. D. 145: 50 L. J. Q. B. 289; 29 W. R. 425.

(*t*) *Manzoni* v. *Douglas*, 6 Q. B. D. 149, *et ubi supra*.

(*u*) 11 C. B. (N. S.) 588; 31 L. J. (C. P.) 129.

that in the case of animate creatures the presumption of negligence is not raised by the happening of the event, which may be due solely to the will of the creature, and not to the act or omission of the person in whose charge it is.

ACTUS NON FACIT REUM NISI MENS SIT REA. (3 *Inst.* 107.)—*The act itself does not make a man guilty unless his intention were so.*

Having seen that the law will, in some cases, imply the nature of a previous intention from a subsequent act, we purpose in the next place to consider the maxim, *Actus non facit reum nisi mens sit rea*, with reference mainly to penal statutes, to criminal law, and to civil proceedings for slander and libel; for, although the principle involved in it applies in many other cases (*x*), we shall defer for the present the consideration of its meaning when so applied, and restrict our remarks almost wholly in this place to an examination of the important doctrine of *criminal intention*.

Intention when material and when implied.

"It is," says Lord *Kenyon*, C. J. (*y*), "a principle of natural justice and of our law, that the intent and the act must both concur to constitute the crime;" "a man," as remarked by *Erle*, C. J. (*z*), "cannot be said to be guilty of a delict, unless to some extent his mind goes with the act," and the first observation which suggests itself in

(*x*) See the maxim, *Caveat emptor*, *post*, Chap. IX.

(*y*) 7 T. R. 514. *Bowman* v. *Blyth*, 7 E. & B. 26, offers a simple illustration of the above proposition. *Et vide Hearne* v. *Garton*, 2 E. & E. 66, 74; *Coward* v. *Baddeley*, 4 H. & N. 478, 481.

(*z*) *Buckmaster*, app., *Reynolds*, resp., 13 C. B. N. S. 68.

limitation of the principle thus enunciated is, that, whenever the law positively forbids a thing to be done, it becomes thereupon *ipso facto* illegal to do it wilfully, or, in some cases, even ignorantly (*a*), or, may be, to effect an ulterior laudable object (*b*), and consequently the doing it may form the subject-matter of an indictment, information, or other penal proceeding, *simpliciter* and without the addition of any corrupt motive (*c*). If there be an infraction of the law the intention to break the law must be inferred, *ex. gr.*, where a man publishes a work manifestly obscene he must be taken to have had the intention which is implied from that act (*d*).

So it has been held (*e*), that a dealer in tobacco, having in his possession adulterated tobacco, although ignorant of the adulteration, is liable under the stat. 5 & 6 Vict. c. 93, s. 3, to the penalties therein mentioned, and this decision merely affirms the principle established in previous cases (*f*), and shows that penalties may be incurred under

(*a*) *Ante*, p. 261.

(*b*) *Reg.* v. *Hicklin*, L. R. 3 Q. B. 360, 372, where Cockburn, C.J., says, "I think the old sound and honest maxim, that you should not do evil that good may come, is applicable in law as well as in morals."

(*c*) *Per* Ashhurst, J., *R.* v. *Sainsbury*, 4 T. R. 457; cited 2 A. & E. 612; *R.* v. *Jones*, Stra. 1146; *per* Lord Mansfield, C.J., *R.* v. *Woodfall*, 5 Burr. 2667; *per* Pollock, C.B., *Hipkins* v. *Birmingham Gaslight Co.*, 5 H. & N. 84; *per* Martin, B., *Id.* 86. See *Re Humphreys*, 14 Q. B. 388; *Reg.* v. *Thomas*, L. & C. 313; *Morden*, app., *Porter*, resp., 7 C. B. N. S. 611.

(*d*) *Reg.* v. *Hicklin*, L. R. 3 Q. B. 360, 370, 373; *Haigh* v. *Town Council of Sheffield*, L. R. 10 Q. B. 107; 44 L. J. M. C. 17; 31 L. T. 536.

In *A.-G.* v. *Sillem*, 2 H. & C. 431, 535, where the question as to intent was much considered, Bramwell, B., observes, "I think it cannot properly be said that a man does an act with intent, unless he intends the act to bring about the thing intended, or unless the act is particularly fitted to do so."

(*e*) *Reg.* v. *Woodrow*, 15 M. & W. 404.

(*f*) *A.-G.* v. *Lockwood*, 9 M. & W. 378, 401; *R.* v. *Marsh*, 4 D. & Ry. 261.

a prohibitory statute, without any intention on the part of the individual offending against the statute law, to infringe its provisions (*g*).

The wilful act of a servant has been held sufficient to make the master liable to a conviction under the licensing laws: thus, where the servant of a licensed victualler knowingly supplied liquor to a police constable on duty without the authority of his superior officer, it was held that the licensed victualler was liable to be convicted under 35 & 36 Vict. c. 94, s. 16, ss. 2, although he was ignorant of the act of his servant (*h*).

In an action against the defendant for penalties under the stat. 3 & 4 Will. 4, c. 15, s. 2, "for representing a pantomime of which the plaintiff was the author, without his licence, at a place of dramatic entertainment," it was held unnecessary to prove that the defendant knew that the plaintiff was the author; inasmuch as he had infringed property of the plaintiff protected by the Act, he was, consequently, an offender within its terms (*i*).

So, "public policy has, for the protection of the Bank of England against forgery, rendered it criminal to make paper bearing the same water-mark as Bank of England notes. The making of such paper is in itself an indifferent act; but, inasmuch as it may afford facilities for forgery, the legislature has on that account prohibited the act" (*k*).

The necessity of showing an intention on the part of the

(*g*) It may be requisite to determine whether an act, *ex. gr.*, shooting a pigeon, was done unlawfully, so as to be brought within the words of a statute; *Taylor* v. *Newman*, 4 B. & S. 89, with which compare *Hudson* v. *MacRae*, *Id.* 585.

(*h*) *Mullins* v. *Collins*, L. R. 9 Q. B. 292; 43 L. J. M. C. 67; 29 L. T. 838.

(*i*) *Lee* v. *Simpson*, 3 C. B. 871. See *Russell* v. *Briant*, 8 C. B. 836; *Gambart* v. *Sumner*, 5 H. & N. 5.

(*k*) *Per* Pollock, C.B., *Atkyns* v. *Kinnier*, 4 Exch. 782. See 24 & 25 Vict. c. 98, s. 14.

prisoner to commit the offence charged, was raised in a case under the statute 24 & 25 Vic. c. 100, sec. 55, by which whosoever shall unlawfully take any unmarried girl under the age of sixteen out of the possession, and against the will of her father or mother, or guardian, is guilty of a misdemeanor; in the particular case the prisoner had taken a girl in fact under the age of sixteen out of the possession, and against the will of her father, but the jury found that the prisoner *bonâ fide* and reasonably believed the girl to be more than sixteen, the question whether, under such circumstances, the prisoner could be convicted under the provisions of the Act having been reserved for the consideration of the judges, they held that the knowledge of the prisoner as to the age of the girl was not material, as he intended to take the girl away, although he did not know she was under the age of sixteen, and that the prisoner was rightly convicted. The judgments, particularly of *Brett*, L. J., and *Bramwell*, L. J., are well worth perusal, dealing as they do with the question of what constitutes a *mens rea* in a criminal case (*l*), Although the decision in *R.* v. *Prince* may at first sight seem to be an exception to the rule that a criminal intention is necessary to constitute a crime, on a careful perusal it would seem not to be so, since, as pointed out by one of the learned judges, the prisoner committed an act which he knew was wrong, namely, taking the girl away against the parent's will, and he ran the risk that she might be under the age of sixteen when he did so.

In general, however, the intention of the party at the time of committing an act charged as an offence is as

(*l*) *R.* v. *Prince*, L. R. 2 C. C. R. 154; 44 L. J. M. C. 122; 32 L. T. 700; *R.* v. *Bishop*, 5 Q. B. D. 259.

necessary to be proved as any other fact laid in the indictment, though it may happen that the proof of intention consists in showing overt acts only, the reason in such cases being, that every man is *primâ facie* supposed to intend the necessary, or even probable or natural consequences of his own acts (*m*). Thus, a prisoner was indicted for setting fire to a mill, with intent to injure and defraud the occupiers; and it was held that, as such injury was a necessary consequence of setting fire to the mill, the *intent* to injure might be inferred (*n*). So, in order to constitute the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is not necessary to show that the prisoner had any enmity to the deceased; nor would proof of absence of ill-will furnish the accused with any defence, when it is proved that the act of killing was intentional, and done without any justification or excusable cause (*o*). And it is, as a general proposition, true, that if an act manifestly unlawful and dangerous be done deliberately, the mischievous intent will be presumed, unless the contrary be shown (*p*). If a man knowingly utters a forged instrument as a genuine one, the intent to defraud the party to whom he utters it is a necessary inference (*q*).

Although drunkenness, as a general rule, is no excuse

(*m*) *Per* Lord Campbell, 9 Cl. & Fin. 321; *per* Littledale, J., *R.* v. *Moore*, 3 B. & Ad. 188, and in *Reg.* v. *Lovett*, 9 C. & P. 466; *per* Lord Ellenborough, C.J., *Newton* v. *Chantler*, 7 East, 143, and in *R.* v. *Dixon*, 3 M. & S. 15; cited *Reg.* v. *Hicklin*, L. R. 3 Q. B. 375; *R.* v. *Harvey*, 2 B. & C. 261, 267; *Wilkin* v. *Manning*, 9 Exch. 575, 582; *Pennell* v. *Reynolds*, 11 C. B. N. S. 709, and cases there cited; *Bell* v. *Simpson*, 2 H. & N. 410. See *Dearden* v. *Townsend*, L. R. 1 Q. B. 10.

(*n*) *R.* v. *Farrington*, Russ. & Ry. 207; *per* Bayley, J., *R.* v. *Harvey*, 2 B. & C. 264.

(*o*) *Per* Best, J., 2 B. & C. 268.

(*p*) 1 East, P. C. 231.

(*q*) *R.* v. *Hill*, 2 Mood. C. C. 30; 8 C. & P. 274.

for crime, yet in cases where the intention with which the act was done is the essence of the offence, it is a circumstance to be taken into consideration in determining whether or not the act was done with the intention laid in the indictment; thus, where on an indictment for attempting to commit suicide it appeared that the prisoner had thrown herself into a well, and the witness who proved this stated that at the time she did so she was so drunk as not to know what she was about; *Jervis*, C.J., said, "If the prisoner was so drunk as not to know what she was about, how can you say that she intended to destroy herself(*r*)?" In cases of murder the degree of provocation which will reduce the offence to that of manslaughter and negative malice aforethought, has been variously and elaborately considered in the authorities given below (*s*), and may be briefly summed up in the following words: "if the act was done while smarting under provocation, of such a character and so recent that the prisoner might reasonably be considered at the time not to be master of his reason, then the crime is manslaughter; but if the act was done with premeditation, in a spirit of revenge, or under such circumstances that he ought to be considered master of his reason at the time when the act was done, then the crime is murder" (*t*).

Bare intention.

It is a rule, laid down by Lord *Mansfield*, and which has been said to comprise all the principles of previous decisions upon this subject, that so long as an act rests in bare intention, it is not punishable by our law; but when an act is done, the law judges not only of the act itself,

(*r*) *Reg.* v. *Moore*, 3 C. & R. 319.

(*s*) *Stedman's case*, Fos. 292; *R.* v. *Fisher*, 8 C. & P. 182; *R.* v. *Walters*, 12 St. Tr. 113; *R.* v. *Thomas*, 7 C. & P. 817; *R.* v. *Kirkman*, 8 C. & P. 115.

(*t*) See further on the subject, Stephen's Digest of the Crim. Law (1877), p. 147.

but of the intent with which it was done; and if the act be coupled with an unlawful and malicious intent, though in itself the act would otherwise have been innocent, yet, the intent being criminal, the act likewise becomes criminal and punishable (*u*).

Attempt. It is accordingly important to distinguish an *attempt* (*x*) from a bare *intention;* for the former a man may—and most justly, in many cases—be made answerable; for the latter he cannot be so. The "will is not to be taken for the deed," unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. If there be an attempt, if there be something tangible and ostensible of which the law can take hold, which can be alleged and proved —there is nothing offensive to our ideas of justice in declaring it to be criminal and punishable. Hence, an attempt to commit a felony is, in many cases, a misdemeanor; and the general rule is, that "an attempt to commit a misdemeanor is a misdemeanor, whether the offence is created by statute, or was an offence at common law" (*y*). Moreover, under various statutes, attempts to commit particular offences are indictable and punishable as therein specified, and the statute 14 & 15 Vict. c. 100, s. 9, enables a jury to convict of the attempt upon an indictment for commission of the substantive offence, wherever the evidence suffices to establish the one though not the other (*z*).

(*u*) *R.* v. *Scofield*, cited 2 East, P. C. 1028; *Dugdale* v. *Reg.*, 1 E. & B. 435, 439.

(*x*) Which Dr. Johnson defines to be an "essay" or "endeavour" to do an act: Dict. *ad verb.* See *Reg.* v. *M'Pherson*, Dearsl. & B. 197; *Reg.* v. *Collins*, L. & C. 471; *Reg.* v. *Cheeseman*, *Id.* 140.

(*y*) Russ. Cr., 5th ed., vol. 1, p. 189.

(*z*) See *Reg.* v. *Hapgood*, L. R. 1 C. C. 221.

Our law, moreover, will sometimes, with a view to determining the intention, couple together two acts which have been separated the one from the other by an appreciable interval of time, and ascribe to the later of these acts that character and quality which undeniably attached and was ascribable to the earlier; and the doctrine of relation is also occasionally brought into play with a view to determining the degree of guilt of an offender. Thus A., whilst engaged in the prosecution of some felonious act, undesignedly causes the death of B.; in strictness A. may be convicted of murder, the felonious purpose conjoined with the homicide being held to fill out the legal conception of that crime (*a*). So, in *Reg.* v. *Riley* (*b*), a felonious intent was held to relate back, and couple itself with a continuing act of trespass, so as, taken in connection with it, to constitute the crime of larceny.

Remoteness.

The observations already made as to the meaning of the word "attempt," in connection with criminal law, may here generally be referred to: it is worthy also of remark, that in *Reg.* v. *Eagleton* (*c*), the Court, after observing that, although "the mere *intention* to commit a misdemeanor is not criminal, some *act* is required to make it so," add, "we do not think that *all* acts towards committing a misdemeanor are indictable. Acts remotely leading towards the commission of the offence are not to be considered as *attempts* to commit it, but acts immediately connected with it are:" the doctrine of "remoteness," already commented on (*d*), has here, consequently, an important application.

(*a*) Fost. Disc. Hom. 258, 259; Crim. L. Com., 1st Rep., 40, 41.

(*b*) Dearsl. 149.

(*c*) Dearsl. 515. See *Reg.* v. *Roberts*, *Id.* 539; *Reg.* v. *Gardner*, Dearsl. & B. 40, with which compare *Reg.* v. *Martin*, L. R. 1 C. C. 56.

(*d*) *Ante*, pp. 199, *et seq.*

A point, moreover, analogous to that just noticed, and by no means free from difficulty, sometimes arises where a person is indicted for attempting to commit a particular offence; in this case, with a view to satisfying ourselves whether or not he can be convicted of the attempt, we must consider whether, if he had succeeded in carrying out his object, he could have been convicted of the substantive offence (*e*)—whether there was such a beginning as would, if uninterrupted, have ended in the completion of the act (*f*).

Persons incapable of design.

Having thus briefly noticed that, with some few peculiar exceptions, in order to constitute an offence punishable by law, a criminal intention must either be presumable, as where an unlawful act is done wilfully, or must be proved to have existed from the surrounding circumstances of the case, it remains to add, that, since the guilt of offending against any law whatsoever necessarily supposes wilful disobedience, such guilt can never justly be imputed to those who are either incapable of understanding the law, or of conforming themselves to it; and, consequently, that persons labouring under a natural disability of distinguishing between good and evil, by reason of their immature years, or of mental imbecility, are not punishable by any criminal proceeding for an act done during the season of incapacity (*g*).

Persons of immature years.

With regard to persons of immature years, the rule is, that no infant within the age of seven years can be guilty of felony (*h*), or be punished for any capital offence; for

(*e*) See *Reg.* v. *Garrett*, Dearsl. 232, in connection with which case see now stat. 24 & 25 Vict. c. 96, s. 89.

(*f*) *Reg.* v. *Collins*, L. & C. 471.

(*g*) Hawk. P. C. by Curwood, Bk. 1, c. 1; 4 Com. by Broom & Hadley, Chap. 2.

(*h*) *Marsh* v. *Loader*, 14 C. B. N. S. 535.

within that age, an infant is, by presumption of law, *doli incapax*, and cannot be endowed with any discretion, and against this presumption no averment shall be received (*i*). This legal incapacity, however, ceases when the infant attains the age of fourteen years, after which period his act becomes subject to the same rule of construction as that of any other person (*k*).

Malitia supplet ætatem.

Between the ages of seven and fourteen years an infant is deemed *primâ facie* to be *doli incapax;* but in this case the maxim applies, *malitia supplet ætatem* (*l*)—malice (which is here used in its legal sense, and means the doing of a wrongful act intentionally, without just cause or excuse (*m*)), supplies the want of mature years. Accordingly, at the age above mentioned, the ordinary legal presumption may be rebutted by strong and pregnant evidence of a mischievous discretion; for the capacity of doing ill or contracting guilt is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. In all such cases, however, the evidence of malice ought to be strong and clear beyond all doubt and contradiction (*n*). And two questions ought, moreover, to be left for the consideration of the jury; first, whether the accused committed the offence; and, secondly, whether at the time he had a guilty knowledge that he was doing wrong (*o*). In the

(*i*) 4 Com. by Broom & Hadley, 18.

(*k*) *Id.*

(*l*) Dyer, 104, b.

(*m*) Arg., *Mitchell* v. *Jenkins*, 5 B. & Ad. 590. "Malice, in the legal acceptation of the word, is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another; *per* Lord Campbell, 9 Cl. & Fin. 321. See also *per* Pollock, C.B., *Sherwin* v. *Swindall*, 12 M. & W. 787, 788; *per* Littledale, J., *M'Pherson* v. *Daniels*, 10 B. & C. 272; *per* Best, J., *R.* v. *Harvey*, 2 B. & C. 267, 268.

(*n*) 4 Bl. Com. 23.

(*o*) *R.* v. *Owen*, 4 C. & P. 236.

An infant, or one *non compos*, is

case of rape, we may add, it is a presumption of law, not admitting of proof to the contrary, that within the age of fourteen years this particular offence cannot, by reason of physical inability, be committed (*p*).

Libel and slander.

A libel is "anything written or printed (*q*), which, from its terms, is calculated to injure the character of another, by bringing him into hatred, contempt, or ridicule, and which is published without lawful justification or excuse" (*r*); and, again, "everything printed or written, which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been" (*s*).

With respect to libel and slander, the rule, as deduced from an extensive class of cases, is that, where an occasion exists, which, if fairly acted upon, furnishes a legal protection to the party who makes the communication complained of, the *actual intention* of the party affords a boundary of legal liability. If he had that legitimate object in view which the occasion supplies, he is neither

liable *civilly* for a tortious act, as a trespass; see *Burnard*, app., *Haggis*, resp., 14 C. B. N. S. 45; *per* Lord Kenyon, C.J., *Jennings* v. *Randall*, 8 T. R. 337; *Johnson* v. *Pye*, 1 Lev. 169; *Bartlett* v. *Wells*, 1 B. & S. 836, with which *acc. De Roo* v. *Foster*, 12 C. B. N. S. 272; *per curiam*, *Weaver* v. *Ward*, Hobart, 134; Bac. Max., reg. 7, *ad finem*.

(*p*) *Reg.* v. *Philips*, 8 C. & P. 736; *Reg.* v. *Jordan*, 9 C. & P. 118; *Reg.* v. *Brimilow*, *Id.* 366; *R.* v. *Groombridge*, 7 C. & P. 582. But an infant under fourteen years of age may be a principal in the second degree. (*R.* v. *Eldershaw*, 3 C. & P. 396.) As to the liability of an infant for misdemeanor, see 4 Bl. Com. 23.

(*q*) The full definition of a libel, however, includes defamation of another by *signs*; see *Du Bost* v. *Beresford*, 2 Camp. N. P. C. 511.

(*r*) *Per* Parke, B., *Gathercole* v. *Miall*, 15 M. & W. 321; *Digby* v. *Thompson*, 4 B. & Ad. 821; *Bloodworth* v. *Gray*, 8 Scott N. R. 9; *Pemberton* v. *Calls*, 10 Q. B. 461.

(*s*) *Per* Parke, B., *O'Brien* v. *Clement*, 15 M. & W. 437; *O'Brien* v. *Bryant*, 15 M. & W. 168; *Darby* v. *Ouseley*, 1 H. & N. 1; *Fray* v. *Fray*, 17 C. B. N. S. 603; *Cox* v. *Lee*, L. R. 4 Ex. 284; *Walker* v. *Brogden*, 19 C. B. N. S. 65.

civilly nor criminally amenable; if, on the contrary, he used the occasion as a cloak for maliciousness, it can afford him no protection (*t*); but if the libel or slander be true in substance and in fact, and be so pleaded, then however malicious the defendant may have been in publishing or uttering the libel or slander, the defendant is not liable in a civil action, although he is so if criminal proceedings be taken against him. It must, moreover, be observed, that, as the honesty and integrity with which a communication of hurtful tendency is made cannot exempt from civil liability, unless it be coupled with an occasion recognised by the law, so responsibility may attach, if the mode or nature of the communication in any respect exceeds that which the legal occasion warrants (*u*).

Privileged communication.

The rule applicable for determining whether a particular communication is privileged, has been thus stated:—

"A communication, made *bonâ fide* upon any subject-matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter, which, without this privilege, would be slanderous and actionable" (*x*).

(*t*) See *per* Parke, B., *Parmiter* v. *Coupland*, 6 M. & W. 108.

An action for libel will lie against a corporation aggregate, *Whitfield* v. *South Eastern R. C.*, E. B. & E. 115, *Lawless* v. *Anglo-Egyptian Cotton & Oil Co., Lmtd.* L. R. 4 Q. B. 262; 38 L. J. Q. B. 129.

(*u*) See *Spill* v. *Maule*, L. R. 4 Ex. 232; *Kelly* v. *Tinling*, L. R. 1 Q. B. 699; *Fryer* v. *Kinnersley*, 15 C. B. N. S. 422.

(*x*) Judgm., *Harrison* v. *Bush*, 5 E. & B. 348; *Whiteley* v. *Adams*, 15 C. B. N. S. 392, 419, 421; *Force* v. *Warren*, *Id.* 806. The subject of privileged communications was much considered in *Coxhead* v. *Richards*, 2 C. B. 569; *Blackham* v. *Pugh*, *Id.* 611; *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94; *Scott* v. *Stansfeld*, L. R. 3 Ex. 220; *Wason* v. *Walter*, L. R. 4 Q. B. 73; *Ex parte Wason*, L. R. 4 Q. B. 573; *Kelly* v. *Tinling*, L. R. 1 Q. B. 699; *Lawless* v. *Anglo-Egyptian Cotton Co.*, L. R. 4 Q. B.

If, for instance, a man received a letter informing him that his neighbour's house would be plundered or burnt on the night following by A. and B., which he himself believed and had reason to believe, to be true, he would be justified in showing that letter to the owner of the house, though it should turn out to be a false accusation of A. and B. (*y*). In like manner, a character of a servant *bonâ fide* given is a privileged communication (*z*), and in giving it, *bona fides* is to be presumed; and, even though the statement be untrue in fact, the master will be held justified by the occasion in making that statement, unless it can be shown to have proceeded from a malicious mind, one proof of which may be, that it is false to the knowledge of the party making it (*a*). So, a comment upon a literary production, exposing its follies and errors, and holding up the author to ridicule, will not be deemed a libel, provided such comment does not exceed the limits of fair and candid criticism, by attacking the character of the writer unconnected with his publication; and a comment of this description, subject to the above proviso, every one has a right to publish, although the author may suffer a loss from it. But, if a person, under the pretence of criticising a literary work, defames the private character of the author, and, instead of writing in the spirit and for the purpose of fair and candid discussion, travels

262; *Beatson* v. *Skene*, 5 H. & N. 838. See *Tighe* v. *Cooper*, 7 E. & B. 639; *Davison* v. *Duncan*, 7 E. & B. 229; *Lewis* v. *Levy*, E. B. & E. 537.

(*y*) *Per* Tindal, C.J., 2 C. B. 596; *Amann* v. *Damm*, 8 C. B. N. S. 597.

(*z*) See *Affleck* v. *Child*, 9 B. & C. 403, 406, recognising the rule laid down by Lord Mansfield, C.J., in *Edmondson* v. *Stevenson*, cited Bull. N. P. 8; *Pattison* v. *Jones*, 8 B. & C. 578.

(*a*) Judgm., *Fountain* v. *Boodle*, 3 Q. B. 11, 12; *Somerville* v. *Hawkins*, 10 C. B. 583; *Taylor* v. *Hawkins*, 16 Q. B. 308; *Manby* v. *Witt*, and *Eastmead* v. *Witt*, 18 C. B. 544.

into collateral matter, and introduces facts not stated in the work, accompanied with injurious comments upon them, such person is a libeller, and liable to an action (*b*).

Reports of public meetings published in newspapers are privileged if such meeting was lawfully convened for a lawful purpose and open to the public, and if such report was fair and accurate, and published without malice, and if the publication of the matter complained of was for the public benefit (*c*). The fair and honest discussion of or comments upon a matter of pubic interest in a newspaper is in point of law privileged, and is not the subject of an action unless the plaintiff can establish malice. Reports of public meetings.

With respect to the evidence of intention in an action for libel, the rule is, that a mere wicked and mischievous intention cannot make matter libellous which does not come within the definition of a libel already given; but, if libellous matter be published under circumstances which do not constitute a legal justification, and injury ensue, the malicious intention to injure will be presumed, according to the principle stated at the commencement of these remarks that, every man must be presumed to intend the natural and ordinary consequences of his own act (*d*). In such a case, however, the spirit and *quo animo* of the party publishing the libel are fit to be considered

(*b*) *Carr* v. *Hood*, 1 Camp. 355, n. (recognised *Green* v. *Chapman*, 4 Bing. N. C. 92); *Campbell* v. *Spottiswoode*, 3 B. & S. 769; *Thompson* v. *Shakell*, M. & M. 187; *Soane* v. *Knight*, *Id.* 74. See *Paris* v. *Levy*, 9 C. B. N. S. 342.

(*c*) Stat. 44 & 45 Vict. c. 60, s. 2, and see Lord Campbell's Act, 6 & 7 Vict. c. 96; *Henwood* v. *Harrison*, L. R. 7 C. P. 606; 41 L. J. C. P. 206; 26 L. T. 938; *Wason* v. *Walter*, L. R. 4 Q. B. 73.

(*d*) *Fisher* v. *Clement*, 10 B. & C. 472; *Haire* v. *Wilson*, 9 B. & C. 643; *Parmiter* v. *Coupland*, 6 M. & W. 105, recognised *Baylis* v. *Lawrence*, 3 P. & D. 526; *per* Best, C.J., *Levi* v. *Milne*, 4 Bing. 199.

by the jury in estimating the amount of injury inflicted on the plaintiff (*e*).

So, in ordinary actions for slander, malice in law may be inferred from the act of publishing the slanderous matter, such act itself being wrong and intentional, and without just cause or excuse.

The respective functions of judge and jury in the trial of an action for libel or slander have been indicated in a recent case in the House of Lords, where it was laid down that it is for the Court to say whether the publication (or the words used) are fairly capable of a construction which would make it libellous or slanderous, and for the jury to say whether in fact that construction ought under the circumstances to be attributed to it (*f*); the judge also is the proper tribunal to determine whether, on the facts found by the jury, if they are in dispute, the occasion was privileged or not (*g*).

Connected with the subject of criminal intention above briefly discussed are two important rules relative thereto; the first is, *in criminalibus sufficit generalis malitia intentionis cum facto paris gradûs*—if the malefactor conceive a malicious intent in the execution of which he does harm to another person he is equally guilty, although he had no intention of doing that particular person an injury (*h*). The second is, *excusat aut extenuat delictum*

(*e*) See *Pearson* v. *Lemaitre*, 6 Scott. N. R. 607; *Wilson* v. *Robinson*, 7 Q. B. 68; *Barrett* v. *Long*, 3 H. L. Cas. 395.

(*f*) *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741, 759; 31 W. R. 157.

(*g*) Judgm., *Cooke* v. *Wildes*, 5 E. & B. 340, recognising *Somerville* v. *Hawkins*, 10 C. B. 583; *Taylor* v. *Hawkins*, 16 Q. B. 308; and *per* Maule, J., *Gilpin* v. *Fowler*, 9 Exch. 615. See also *Homer* v. *Taunton*, 5 H. & N. 661; *Croft* v. *Stevens*, 7 H. & N. 570.

(*h*) *Reg.* v. *Smith*, Dearsl. 559.

in capitalibus quod non operatur in civilibus—in capital cases the law is in favour of life, and will not punish with death unless a malicious intention appear (*i*); but it is otherwise in civil actions, where the intent may be immaterial if the act done were injurious to another (*k*); of which rule a familiar instance occurs in the liability of a sheriff, who, by mistake, seizes the goods of the wrong party under a writ of *fi. fa.* So, an action for the infringement of a patent "is maintainable in respect of what the defendant *does*, not of what he *intends*" (*l*); the patentee is not the less prejudiced because the invasion of his right was unintentional (*m*).

Gray v. *Reg*

One case, in which the principle *in favorem vitæ*, adverted to by Lord *Bacon*, was considered, may here be noticed, since it involves a point of considerable importance, and has attracted much attention. It was decided by the House of Lords, on writ of error from the Court of Queen's Bench in Ireland, that the privilege of peremptory challenge on the part of the prisoner extends to all felonies, whether capital or not; and it was observed by *Wightman*, J. (delivering his opinion on a question proposed for the consideration of the judges, and commenting on the position, that the privilege referred to was allowed only *in favorem vitæ*, and did not extend to cases in which the punishment is not capital), that it would seem that the origin of the privilege in felony may have been the capital punishment usually incident to the quality of crime; but that the privilege was, at all

(*i*) Bacon's Maxims, reg. 7.

(*k*) *Per* Lord Kenyon, C.J., 2 East, 103–104.

(*l*) *Stead* v. *Anderson*, 4 C. B. 806, 834; *Lee* v. *Simpson*, 3 C. B. 871, cited judgm. *Reade* v. *Conquest*, 11 C. B. N. S. 492.

(*m*) *Per* Shadwell, V.-C. E., *Heath* v. *Unwin*, 15 Sim. 552; S. C. (in error), 5 H. L. Cas. 505.

events, annexed to the quality of crime called felony, and continued so annexed in practice in England (at least down to the time when the question was raised), in all cases of felony, whether the punishment was capital or not (*n*).

In all criminal cases whenever upon the evidence given at the trial a reasonable doubt as to the prisoner's guilt or innocence is raised, the best rule is to incline to an acquittal than conviction.

Tutius semper est errare in acquietando quam in puniendo, ex parte misericordiæ, quam ex parte justitiæ (*o*).

NEMO DEBET BIS VEXARI PRO UNA ET EADEM CAUSA. (5 *Rep.* 61).—*It is a rule of law that a man shall not be twice vexed for one and the same cause* (*p*).

Exception, in the Roman law.

According to the Roman law, as administered by the prætors, an action might be defended by showing such acts as might induce the prætor, on equitable grounds, to declare certain defences admissible, the effect of which, if established, would be not, indeed, to destroy the action *ipso jure*, but to render it ineffectual by means of the "exception" thus specially prescribed by the prætor for the consideration of the judge, to whose final decision the action might be referred. In the class of exceptions just adverted to was included the *exceptio rei judicatæ*, from

(*n*) *Gray* v. *Reg.*, 11 Cl. & Fin. 427; *Mulcahy* v. *Reg.*, L. R. 3 H. L. 306. The right of peremptory challenge by the Crown was much considered in *Mansell* v. *Reg.*, 8 E. & B. 54.

(*o*) 2 Hale, P. C. 290.

(*p*) 5 Rep. 61.

which the plea of judgment recovered in our own law may be presumed to have derived its origin (*q*). The *res judicata* was, in fact, a result of the definitive sentence, or decree of the judge, and was binding upon, and in general unimpeachable by the litigating parties (*r*); and this was expressed by the well-known maxim, *Res judicata pro veritate accipitur* (*s*), which must, however, be understood to have applied only when the same question which had been once judicially decided was again raised between the same parties, the rule being *exceptionem rei judicatæ obstare quoties eadem quæstio inter easdem personas revocatur* (*t*).

Doctrine of our law as to *res judicata*.

In our own law, the plea of judgment recovered at once suggests itself as analogous to the "*exceptio rei judicatæ*" above mentioned, and as directly founded on the general rule that "a man shall not be twice vexed for the same cause." "If," as remarked by Lord *Kenyon*, C.J., "an action be brought, and the merits of the question be discussed between the parties, and a final judgment (*u*) obtained by either, the parties are concluded,

(*q*) See 1 Cl. & Fin. 435; Phillimore, Rom. L. 43.

(*r*) Brisson. ad verb. *Res*. Pothier, ad D. 42. 1. pr.

(*s*) D. 50. 17. 207.

(*t*) D. 44. 2. 3. Pothier, ad D. 44. 1. 1. pr.

(*u*) A judgment or sentence "is a judicial determination of a cause agitated between real parties; upon which a real interest has been settled. In order to make a sentence, there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these requisites, not one takes place in the case of a fraudulent and collusive suit. There is no judge: but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question." *Per* Wedderburn, S.-G., arg. in the *Duchess of Kingston's case*, 20 Howell, St. Tr. 478, 479; adopted *per* Lord Brougham, *Earl of Bandon* v. *Becher*, 3 Cla. & F. 510. See *Doc* d. *Duntze* v. *Duntze*, 6 C. B. 100; *Finney* v. *Finney*, L. R. 1 P. & D. 483; *Conradi* v. *Conradi*, *Id.* 514; 31 & 32 Vict. c. 54.

and cannot canvass the same question again in another action (*x*), although, perhaps, some objection or argument might have been urged upon the first trial, which would have led to a different judgment." In such a case, the matter in dispute having passed *in rem judicatam*, the former decision is conclusive between the parties, if either attempts, by commencing another action, to re-open the question (*y*).

When there is *res judicata* the original cause of action is gone, and the object of the rule is always put upon two grounds; the one, public policy that there should be an end of litigation; the other, the hardship on the individual that he should be twice vexed for the same cause (*z*).

A plea of *res judicata* must show either an actual merger or that the same point has already been decided between the same parties—that the plaintiff had an opportunity of recovering, and but for his own fault might have recovered in the original suit that which he seeks to recover in the second action (*a*). "I apprehend," said a learned judge in a recent case, "that if the same matter or cause of action has already been finally adjudicated on between the parties by a court of competent jurisdiction, the plaintiff has lost his right to put it in suit, either

(*x*) Also, "The law will never compel a person to pay a sum of money a second time which he had paid once under the sanction of a court having competent jurisdiction." Judgm., *Wood* v. *Dunn*, L. R. 2 Q. B. 80, citing *Allen* v. *Dundas*, 3 T. R. 125.

(*y*) *Per* Lord Kenyon, C.J., *Greathead* v. *Bromley*, 7 T. R. 456; *Huffer* v. *Allen*, 4 H. & C. 634; S. C., L. R. 2 Ex. 15; *Lord Bagot* v. *Williams*, 3 B. & C. 235; *Place* v. *Potts*, 8 Exch. 705; S. C. (affirmed in error), 10 Exch. 370, 5 H. L. Cas. 383; *Tommey* v. *White*, 1 H. L. Cas. 160; S. C., 3 *Id.* 49; 4 *Id.* 313; *Overton* v. *Harvey*, 9 C. B. 324, 337.

(*z*) *Lockyer* v. *Ferryman*, 2 App. Cas. 519.

(*a*) *Nelson* v. *Couch*, 15 C. B. N. S. 99, 108, 109, and cases there cited.

before that or any other court. The conditions for the exclusion of jurisdiction on the ground of *res judicata*, are, that the same identical matter shall have come in question already in a court of competent jurisdiction, that the matter shall have been controverted, and that it shall have been finally decided (*b*). An illustration of this doctrine is given in a case where the conviction of the defendant, a driver of a carriage, under the statute 5 & 6 Wm. IV. c. 50, sec. 78, for causing hurt or damage to a person lawfully passing along the highway, was held a bar to a subsequent conviction under another statute for an unlawful assault on the same person (*c*).

It should be stated that a verdict against a man suing in one capacity will not estop him when suing in another capacity, and in fact is a different person in law; and conversely, it has been held that if a widow sues a railway company under Lord *Campbell's* Act for the loss sustained by herself and her children by reason of the death of her husband caused by the negligence of the Company, in which action the Company denied negligence, which issue was found by the jury in the plaintiff's favour; in a subsequent action by the widow suing as administratrix to her husband, the Company are not estopped from again denying negligence, since the plaintiff sued in a different right in each action (*d*). Further, to constitute a prior judgment an estoppel, the same point (but not necessarily the only one) (*e*), must have been in issue; thus, to an

(*b*) *Per* Willes, J., *Langmead* v. *Maple*, 18 C. B. N. S. 270.

(*c*) *Wemyss* v. *Hopkins*, L. R. 10 Q. B. 378; 44 L. J. M. C. 101; 32 L. T. 9; see *Cutler* v. *Turner*, L. R. 9 Q. B. 502; 43 L. J. M. C. 124; 30 L. T. 706: *Eddliston* v. *Barnes*, 1 Ex. D. 67; 45 L. J. M. C. 73; 34 L. T. 497.

(*d*) *Leggott* v. *The Great Northern R. C.*, 1 Q. B. D. 599; 45 L. J. Q. B. 557; 35 L. T. 334.

(*e*) *R.* v. *St. Pancras*, Peake 219.

action of debt on an indenture whereby the defendant covenanted to pay to the plaintiff 600*l.* with interest on a certain day, the defendant pleaded by way of estoppel that the plaintiff had impleaded him in a former action of debt on a bond conditioned in the penal sum of 1,200*l.* to pay 600*l.* and interest, being the same principal sum and interest as were secured to the plaintiff by an indenture of even date with the bond (being the same indenture as that sued on in the second action), in which action (the first) the defendant pleaded a usurious agreement, and averred that the bond was given in pursuance of the agreement, which averment was found in the defendant's favour, it was held that the plea showed no estoppel because the existence of a usurious agreement was not directly in issue in the former action, but only the question whether the bond was given in pursuance of the agreement (*f*).

Having thus premised that a court of law will not, except under peculiar circumstances, re-open a question which has once been judicially decided between the parties (*g*), we may remark that the maxim of the civil law already cited—*res judicata pro veritate accipitur*—is generally recognised and applied by our own (*h*). "The

(*f*) *Carter* v. *James*, 13 M. & W. 137.

(*g*) It must be taken as a positive rule, that when parties consent to withdraw a juror no future action can be brought for the same cause: *per* Pollock, C. B., *Gibbs* v. *Ralph*, 14 M. & W. 805; *per* Lord Abinger, C. B., *Harries* v. *Thomas*, 2 M. & W. 37, 38; *Strauss* v. *Francis*, L. R. 1 Q. B. 379; 35 L. J. Q. B. 133.

(*h*) See *per* Knight Bruce, V.-C., 1 Y. & Coll. 588, 589; *Preston* v. *Peeke*, R. B. & E. 336; *per* Wightman, J., *Mortimer* v. *South Wales R. C.*, 1 E. & E. 382–3; *Notman* v. *Anchor. Ass. Co.*, 6 C. B. N. S. 536; *Kelly* v. *Morray*, L. R. 1 C. P. 667; *Williams* v. *Sidmouth R. and Harb. Co.*, L. R. 2 Ex. 284.

"The Court is always at liberty to look at its own records and proceedings" (*per* Kelly, C. B., *Craven* v. *Smith*, L. R. 4 Ex. 149); and nothing can be assigned for error, in fact, which is inconsistent with the record (*Irwin* v. *Grey*, 19 C. B. N. S. 585).

As to the efficacy of a judgment of

authorities," as observed by Lord *Tenterden*, C.J. (*i*), "are clear, that a party cannot be received to aver as error in fact a matter contrary to the record," and "a record imports such absolute verity that no person against whom it is admissible shall be allowed to aver against it" (*k*), and this principle is invariably acted upon by our courts (*l*).

The judgment of a court of concurrent jurisdiction directly upon the point is as a plea a bar, or as evidence conclusive between the same parties upon the same matter directly in question in another court (*m*); likewise the judgment of a court of exclusive jurisdiction coming incidentally in another court for a different purpose (*n*).

Plea of judgment recovered.

In connection with the subject now under consideration, we may observe, 1st, that although a judgment recovered, if for the same cause of action, and between parties substantially the same, will be admissible in evidence, yet, in order to render it *conclusive* as an estoppel, the facts raising the issue of estoppel must be concisely stated (*o*).

the House of Lords, see *A.-G.* v. *Dean, &c., of Windsor*, 8 H. L. Cas. 369; *Beamish* v. *Beamish*, 9 *Id.* 274.

The resolution of a Committee for Privileges in favour of a claimant of a peerage agreed to by the House and communicated to the Crown, followed by a writ of summons to the claimant by the title of the dignity claimed, establishes the right to that dignity (at all events from the date of the writ of summons), which can never afterwards be called in question. But a resolution of a Committee for Privileges is in no sense a judgment, and though admitted to be *primâ facie* valid and conclusive, does not establish a precedent which future committees are bound to follow. *Wiltes Peerage*, L. R. 4 H. L. 126, 147–8.

(*i*) Judgm., *R.* v. *Carlile*, 2 B. & Ad. 367.

(*k*) *Ib.*; 1 Inst. 260.

(*l*) *Reed* v. *Jackson*, 1 East, 355.

(*m*) 20 Howell, St. Tr. 538.

(*n*) Judgm., *King* v. *Norman* 4 C. B. 898; *Needham* v. *Bremn* L. R. 1 C. P. 583.

(*o*) Formerly the judgment must, if

Todd v. Stewart.

In *Todd* v. *Stewart* (*p*), the effect of a plea of judgment recovered for a less sum than that sued for in the action then before the Court was much considered. That was an action of debt on simple contract for 400*l.*; the defendants pleaded as to 43*l.* 6*s.* 9*d.* payment, and as to the residue that plaintiffs impleaded defendants for the same in an action on promises, and recovered 314*l.* 8s., as well for their damages in the said action as for their costs. The replication alleged that the residue of the said causes of action, in the declaration mentioned, were not the causes of action in respect of which the judgment was recovered; and on the issue thus raised the jury found for the defendants. It was held by the Court of Exchequer Chamber that the above plea was good after verdict, and that it amounted to an ordinary plea of judgment recovered.

Judgment conclusive between what parties.

2ndly. We may remark, that a judgment recovered will be admissible as evidence, not only between the same parties, if suing in the same right (*q*), but likewise between their privies, whether in blood, law, or estate (*r*); and that a judgment will, moreover, be evidence between those who, although not nominally, are really and substantially the same parties (*s*).

In the well-known case of *King* v. *Hoare* (*t*), it was

the opportunity presented itself, have been pleaded as an estoppel: *Whittaker* v. *Jackson*, 2 H. & C. 926; *Doe* v. *Huddart*, 2 Cr. M. & R. 316.

(*p*) 9 Q. B. 759, 767.

(*q*) *Outram* v. *Morewood*, 3 East, 346, 365; Com. Dig. *Estoppel* (C.); 5 Rep. 32, b.

(*r*) *Trevivan* v. *Lawrence*, Salk. 276.

(*s*) *Kinnersley* v. *Cope*, 2 Dougl. 517, commented on, 3 East, 366, and recognised *Simpson* v. *Pickering*, 1 Cr. M. & R. 529; *Strutt* v. *Bovingdon*, 5 Esp. 56; *Hancock* v. *Welsh*, 1 Stark., N. P. C. 347.

(*t*) 13 M. & W. 494; *Buckland* v.

held, that a judgment *without* satisfaction recovered against one of two joint debtors may be pleaded in bar of an action against the other contracting party. Hence the legal maxim *Transit in rem judicatam*—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but *one cause of action*, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action being single, cannot afterwards be divided into two." This principle was recognised, and *King* v. *Hoare* stated to be good law in a recent case in the House of Lords, in which the two questions were, first, whether a partnership debt was several as well as joint; and secondly, whether an unsatisfied judgment recovered against two of the three partners of a firm was a bar to an action against the third; the House held that a partnership debt was, at least to the extent of determining the legal position of the parties, joint and not several, and that a judgment recovered against the two was a bar to an action against the third (*u*). The rule here laid down does not apply where the parties are severally as well as jointly bound, and the recovery of a judgment against one is no bar to an action against the other, until the judgment has been satisfied (*x*). On the other hand, a judgment against one of two joint wrong-doers

Johnson, 15 C. B. 145. See *Holmes* v. *Newlands*, 5 Q. B. 634; *Florence* v. *Jenings*, 2 C. B. N. S. 454.

(*u*) *Kendall* v. *Hamilton*, 4 App. Cas. 504; 48 L. J. C. P. 705; 41 L. T. 418.

(*x*) *Vestry of Bermondsey* v. *Ramsey*, L. R. 6 C. P. 247; 40 L. J. C. P. 206; 24 L. T. 429.

is, without satisfaction, a bar to an action against the other, although both may be sued separately (*y*).

Judgment when conclusive.

We may observe, that a judgment recovered will be evidence whenever the cause of action is the same (*z*), although the form of the second action be different from that of the first (*a*); and the record, when produced, must be such as to show on its face that the cause of action in the second case may be the same as that for which the judgment was recovered in the former action (*b*). A recovery in trover will vest the property in the chattel sued for in the defendant, and will be a bar to an action of trespass for the same thing (*c*); and "If two jointly convert goods, and one of them receive the proceeds, you cannot, after a recovery against one in trover, have an action against the other for the same conversion, or an action for money had and received to recover the value of the goods, for which a judgment has already passed in the former action" (*d*).

If, however, it be doubtful whether the second action

(*y*) *Buckland* v. *Johnson*, 15 C. B. 145; 23 L. J. C. P. 204; *Brinsmead* v. *Harrison*, L. R. 6 C. P. 584; 40 L. J. C. P. 281, affirmed L. R. 7 C. P. 547; 41 L. J. C. P. 19; 27 L. T. 99.

(*z*) *Per cur.*, *Williams* v. *Thacker*, 1 B. & B. 514; cited, Arg. *Hopkins* v. *Freeman*, 13 M. & W. 372; *Guest* v. *Warren*, 9 Exch. 379; *per* Beardsley, C.J., *Dunckle* v. *Wiles*, 5 Denio (U. S.), R. 303; *Fetter* v. *Beal*, 1 Lord Raym. 339, 692; cited, Sayer on Damages, 89.

(*a*) See, *per* Buller, J., *Foster* v. *Allanson*, 2 T. R. 483; *Pease* v. *Chaytor*, 32 L. J. M. C. 121. *Bona fides non patitur ut bis idem exigatur*; D. 50. 17. 57.

(*b*) *Per* Crompton, J., *Wadsworth* v. *Bentley*, 23 L. J. Q. B. 3; *Ricardo* v. *Garcias*, 12 Cl. & F. 368, 387.

(*c*) *Per* Lord Hardwicke, C. J., *Smith* v. *Gibson*, Cas. temp. Hardw. 319; *Buckland* v. *Johnson*, 15 C. B. 145; *Moor* v. *Watts*, 1 Lord Raym. 614.

(*d*) *Per* Jervis, C. J., 15 C. B. 161; citing, *Cooper* v. *Shepherd*, 3 C. B. 266; *Adams* v. *Broughton*, Andr. 18; Jenk. Cent. 4th cent. cas. 88.

is brought *pro eâdem causâ*, it is a proper test to consider whether the same evidence would sustain both actions (*e*), and what was the particular point or matter determined in the former action; for a judgment in each species of action is final only for its own purpose and object, and *quoad* the subject-matter adjudicated upon, and no further; for instance, a judgment for the plaintiff in trespass affirms a right of possession to be, as between the plaintiff and defendant, in the plaintiff at the time of the trespass committed, but, in a subsequent ejectment between the same parties, would not be conclusive with respect to the general right of property in the *locus in quo* (*f*). Where, in an action for the stipulated price of a specific chattel, the defendant pleaded payment into court of a sum, which the plaintiffs took out in satisfaction of the cause of action: it was held, that the defendants in that action was not thereby estopped from suing the plaintiffs for negligence in the construction of the chattel (*g*)

Not merely is it true, moreover, that the facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are evidence between them, and that conclusive, for the purpose of terminating litigation; but so likewise are the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, provided that the traverse thus taken be

(*e*) See *Hadley* v. *Green*, 2 Tyrw. 390; *Wiat* v. *Essington*, 2 Lord Raym. 1410; *Clegg* v. *Dearden*, 12 Q. B. 576; (with which compare *Smith* v. *Kenrick*, 7 C. B. 515); *per* Lord Westbury, C., *Hunter* v. *Stewart*, 31 L. J., Chanc., 346, 350.

(*f*) See Judgm., 3 East, 357.

(*g*) *Rigge* v. *Burbidge*, 15 M. & W. 598; recognising *Mondel* v. *Steele*, 8 M. & W. 858.

found against the party making it (*h*). "The statements," however, "of a party in a declaration or plea, though for the purposes of the cause he is bound by those that are material, and the evidence must be confined to them upon an issue, ought not, it should seem, to be treated as confessions of the truth of the facts stated" (*i*).

Award effect of as merging original cause of action.

An award does not in all cases operate as a merger of the original claim referred; if the claim is for a debt and the reference is merely whether the debt is well founded and to what amount, the award of a certain amount due in respect of the debt leaves that amount due in respect of the original claim, and is no discharge without payment or satisfaction (*k*); but the person in whose favour the award is made is precluded from suing in respect of the original claim for a larger sum than that awarded (*l*); but if the claim is for general damage caused by a breach of contract or for not delivering goods, or if the award create a new duty instead of that which was in controversy, as, for example, if the demand be for a debt, and the award direct payment in a collateral way, the original claim is merged in the award, and bars the party in whose favour it is made from suing on the original claim, provided the award be enforceable by him (*m*).

Ejectment.

With respect to the action of ejectment, we may remark, that by the judgment therein the plaintiff

(*h*) *Boileau* v. *Rutlin*, 2 Exch. 665, 681; recognised, *per* Parke, B., *Buckmaster* v. *Meiklejohn*, 8 Exch. 687. See *Carter* v. *James*, 13 M. & W. 137, and the remark upon that case, *per* Pollock, C.B., *Hutt* v. *Morrell*, 3 Exch. 241.

(*i*) Judgm., *Boileau* v. *Rutlin*, *supra*.

(*k*) *Allen* v. *Milner*, 2 C. & J. 47.

(*l*) *Commins* v. *Heard*, L. R. 4 Q. B. 669; 20 L. T. 975; 18 W. R. 16.

(*m*) *Crofts* v. *Harris*, Carth. 187; *Gascoyne* v. *Edwards*, 1 Y. & J. 19; *Bates* v. *Townley*, 2 Ex. 157, *per* Parke, B.; *Parkes* v. *Smith*, 15 Q. B. 297.

obtains possession of the lands recovered by the verdict, but does not acquire any title thereto, except such as he previously had; if, therefore, he had previously a freehold interest in them, he is in as a freeholder; if he had a chattel interest, he is in as a termor; and if he had no title at all, he is in as a trespasser, and will be liable to account for the profits to the legal owner (*n*). Moreover, although a judgment in ejectment is admissible in evidence in another ejectment between the same parties (*o*), yet it is not conclusive evidence, because a party may have a title to possession of land at one time, and not at another; nor could a judgment be pleaded in ejectment by way of estoppel, for the issue was made up in this action without pleadings; and hence there is a remarkable difference between ejectment and other actions with regard to the application of the maxim under consideration (*p*). The courts of common law have, however, sometimes interfered to stay proceedings in ejectment, either in order to compel payment of the costs in a former action (*q*), or where such proceedings were manifestly vexatious and oppressive (*r*).

The order of a County Court judge under the statute

(*n*) *Per* Lord Mansfield, C. J., *Taylor* d. *Atkyns* v. *Horde*, 1 Burr. 114.

(*o*) *Doe* d. *Strode* v. *Seaton*, 2 Cr. M. & R. 728.

(*p*) For form of pleadings in actions for recovery of land, see Rules S. C. 1883 (App.) C. sect. vii.

(*q*) *Doe* d. *Brayne* v. *Bather*, 12 Q. B. 941; *Morgan* v. *Nicholl*, 3 H. & N. 215. See *Prowse* v. *Loxdale*, 32 L. J., Q. B., 227; *Hoare* v. *Dickson*, 7 C. B. 164; *Stead* v. *Williams*, 5 C. B. 528; *Stilwell* v. *Clarke*, 3 Exch. 264; *Danvers* v. *Morgan*, 17 C. B. 530.

(*r*) See *Cobbett* v. *Warner*, L. R. 2 Q. B. 108; *Doe* d. *Pultney* v. *Freeman*, cited 2 Sellon, Pract., 144; *Doe* d. *Henry* v. *Gustard*, 5 Scott, N. R. 818; *Thrustout* d. *Park* v. *Troublesome*, Andr. 297, recognised *Haigh* v. *Paris*, 16 M. & W. 144.

19 & 20 Vict. c. 101, sec. 50, is not conclusive evidence of title in a subsequent action against such person for mesne profits; and such order would not seem conclusive against him even as to the right to possession (*s*). But although the judgment of a court of competent jurisdiction upon the same matter will, in general, be conclusive between the same parties, such a judgment may nevertheless be set aside on the ground of mistake (*t*), or may be impeached on the ground of fraud (*u*). The rule *nemo bis vexari potest pro eâdem causâ* has no application where the first proceedings were collusive and practically for the protection of the defendant; thus, where the defendants having incurred penalties for keeping open the Brighton Aquarium procured a man of the name of Rolfe to sue them for the penalties which it was agreed should not be enforced, and subsequently they were sued by one Girdlestone for the same penalties, the judgment in the first action was held no bar to the later action, the former having been obtained under circumstances which amounted to covin and collusion (*x*).

Judgment may be impeached in certain cases.

We have in the preceding remarks endeavoured to point out the most direct application in civil proceedings of the rule that a man shall not be *bis vexatus*, which rule is in fact included in the general maxim—*Interest reipublicæ ut sit finis litium.* To the same maxim may

(*s*) *Campbell* v. *Loader*, 3 H. & C. 520; *Hodson* v. *Walker*, L. R. 7 Ex. 55; 41 L. J., Ex. 51; 25 L. T. 937.

(*t*) *Cannan* v. *Reynolds*, 5 B. & B. 301.

(*u*) "It may be conceded that if a judgment has been obtained by fraud, or is contrary to natural justice, it may be impeached in a collateral proceeding;" *per* Byles, J., *Wildes* v. *Russell*, L. R. 1 C. P. 745.

(*x*) *Girdlestone* v. *The Brighton Aquarium*, 3 Ex. D. 137; 4 Ex. D. 107; 48 L. J., Ex. 373; 40 L. T. 473, C. A. But see the judgment of Brett, L. J., in the Court of Appeal.

likewise be referred the principle of the limitation of actions, which we shall treat of hereafter (*y*); the right of set-off and counter-claim given by the Judicature Acts; and the rule which forbids circuity in legal proceedings—*circuitus est evitandus* (*z*), in accordance with which a court of law will endeavour to prevent circuity and multiplicity of suits, where the circumstances of the litigant parties are such that, on changing their relative positions of plaintiff and defendant, the recovery by each would be equal in amount (*a*).

Circuity to be avoided.

The principle of law that the right to bring a personal action once existing, and by act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive is very old and well established (*b*). It is usually applied where persons have by their own acts placed themselves in circumstances incompatible with the application of the ordinary legal remedies (*c*); but this principle applies only to the case where there has been once a subsisting right of action, and not to a case where the objection is that if it had accrued earlier it could not have been enforced from the fact of the same person being the party to sue and be sued (*d*).

Where many actions are oppressively and vexatiously brought by the same plaintiff, for the purpose of trying the same question, the Court or a judge will in general interfere, either by staying the proceedings or giving

(*y*) See maxim, *Vigilantibus et non dormientibus jura subveniunt: post*, Chap. IX.

(*z*) 5 Rep. 31; Co. Litt, 348, a; 2 Saund. R. 150. See *Wilders* v. *Stevens*, 15 M. & W. 208; *Milnes* v. *Field*, 5 Exch. 829.

(*a*) See *Carr* v. *Stephens*, 9 B. & C. 758; *per* Parke, B., *Penny* v. *Innes*, 1 Cr., M. & R. 442; Arg. *Hall* v. *Bainbridge*, 5 Q. B. 242; *Simpson* v. *Swan*, 3 Camp. 291.

(*b*) Judgm., 11 Q. B. 870.

(*c*) Jenk. Cent. 256.

(*d*) *Badely* v. *Vigurs*, 4 E. & B. 71; 23 L. J. Q. B. 377.

time to plead in all the actions but one upon terms (*e*).

Application in criminal law.

An important application of the general principle now under notice occurs in criminal law, for there it is a well-established rule, that when a man has once been indicted for an offence, and acquitted, he cannot afterwards be indicted for the same offence, provided the first indictment were such that he could have been lawfully convicted upon it by proof of the facts contained in the second indictment; and if he be thus indicted a second time he may plead *autrefois acquit*, and it will be a good bar to the indictment (*f*); and this plea is clearly founded on the principle, that no man shall be placed in peril of legal penalties more than once upon the same accusation — *nemo debet bis puniri pro uno delicto* (*g*). Which great fundamental maxim of our criminal law means that "a man shall not twice be put in peril after a verdict has been returned by the jury; that verdict

(*e*) Chitty's Arch. Pr., 13th ed., 1105. See *Frith* v. *Guppy*, L. R. 2 C. P. 32; *Sturges* v. *Lord Curzon*, 1 H. & N. 17; and *Cannot* v. *Morgan*, 1 Ch. Div. 1; 45 L. J. Ch. 50, C. A.

In the case of a bill of exchange every party to the instrument may be sued at the same time by the holder, for, by the custom of merchants, every such party is separately liable; *per* Pollock, C. B., 3 H. & C. 981. See *Woodward* v. *Pell*, L. R. 4 Q. B. 55.

Where the master of a ship signs a bill of lading in his own name and is sued upon it, and judgment is obtained against him, though not satisfied, the owner of the ship cannot be sued upon the same bill of lading; *Priestly* v. *Fernie*, 3 H. & C. 977.

(*f*) *Reg.* v. *Bird*, 2 Den. C. C. 94, 198–200, 214; *Reg.* v. *Knight*, L. & C. 378; *R.* v. *Vandercomb*, 2 East, P. C. 519; cited, *per* Gurney, B., *R.* v. *Birchenough*, 1 Moo., Cr. Cas., 479. See *Reg.* v. *Button*, 11 Q. B. 929; *Reg.* v. *Machen*, 14 Q. B. 74; *Reg.* v. *Gaunt*, L. R. 2 Q. B. 466; *Reg.* v. *Moah*, Dearsl. 626. As to the meaning of the words "conviction" and "acquittal," see *per* Tindal, C.J., *Burgess* v. *Boetefeur*, 8 Scott, N. R., 211, 212; *Re Newton*, 13 Q. B. 716.

(*g*) 4 Rep. 40, 43; *per* Pollock, C.B., *Re Baker*, 2 H. & N. 248.

being given on a good indictment, and one on which the prisoner could be legally convicted and sentenced. It does not, however, follow, if from any particular circumstance a trial has proved abortive, that then the case shall not be again submitted to the consideration of a jury, and determined as right and justice may require" (*h*).

Thus an acquittal upon an indictment for murder may be pleaded in bar of another indictment for manslaughter; and an acquittal upon an indictment for burglary and larceny may be pleaded to an indictment for the larceny of the same goods; because in either of these cases the prisoner might, on the former trial, have been convicted of the offence charged against him in the second indictment (*i*); the true test by which to decide whether a plea of *autrefois acquit* is a sufficient bar in any particular case being—whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first.

On the principle that "a man should not twice be put in jeopardy for one and the same offence," a plea of *autrefois convict* will operate to bar a second indictment, unless the judgment on the former has been reversed for error (*k*). It may, however, be laid down generally, that where, "by reason of some defect in the record, either in the indictment, place of trial, process, or the like, the prisoner was not lawfully liable to suffer judgment for the offence charged on that proceeding," he cannot, after reversal of the judgment, properly be said to have been

(*h*) *Per* Cockburn, C.J., *Winsor* v. *Reg.*, L. R. 1 Q. B. 311, S. C., affirmed in error, *Id.* 390.

(*i*) 2 Hale, P. C., 246. See also, *Helsham* v. *Blackwood*, 11 C. B. 111.

(*k*) *Reg.* v. *Drury*, 18 L. J., M. C., 189. See *Reg.* v. *Morris*, L. R. 1 C. C. 90.

"in jeopardy" within the meaning of the maxim under consideration (*l*). So where, on a trial for misdemeanor, the jury are improperly, and against the will of the defendant, discharged from giving a verdict after the trial has begun, this is not equivalent to an acquittal (*m*).

The decision of Quarter Sessions quashing an order of affiliation on the ground of the insufficiency of the corroborative evidence is final and a bar to any fresh summons taken out by the mother (*n*).

Rule, how qualified.

The general rule, which obtains as well in purely civil as in criminal cases, being that "a man shall not be twice vexed in respect of the same matter," is subject to exceptions. For instance,—a man may at common law be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace in consequence of the same act (*o*), and may thus be said in common parlance to be twice punished for the same offence (*p*). So it has been held that a conviction for an assault by justices at petty sessions, at the instance of the person assaulted, and

(*l*) *Per* Coleridge, J., *Reg.* v. *Drury*, 18 L. J. M. C. 189; *Reg.* v. *Green*, Dearsl. & B. 113. See also Lord Denman's judgment, *O'Connell* v. *Reg.*, by Mr. Leahy, pp. 19 *et seq.*, and p. 44; *Reg.* v. *Gompertz*, 9 Q. B., 824, 839.

(*m*) *Reg.* v. *Charlesworth*, 1 B. & S. 460; *et vide per* Cockburn, C.J., *Id.* 507, as to the maxim, *supra*.

(*n*) *R.* v. *Glynne*, L. R. 7 Q. B. 16; 41 L. J., M. C. 58; 26 L. T. 61.

(*o*) See stat. 25 & 26 Vict. c. 88, ss. 11, 22.

(*p*) *Per* Grier, J., 14 Howard (U. S.), R. 20. See stat. 24 & 25 Vict. c. 100, ss. 44, 45 (as to which see *Hartley* v. *Hindmarsh*, L. R. 1 C. P. 553; *Reg.* v. *Elrington*, 1 B. & S. 688; *Hancock* v. *Somes*, 1 E. & E. 795: *Costar* v. *Hetherington*, *Id.* 802); *Justice* v. *Gosling*, 12 C. B. 39; *R.* v. *Mahon*, 4 A. & E. 575; *Anon.*, *Id.* 576, *n.*

In *Scott* v. *Lord Seymour*, 1 H. & C. 219, an action was held maintainable here by a British subject against another British subject for an assault committed at Naples, although proceedings for the same assault were pending in a Neapolitan court. See *Cox* v. *Mitchell*, 7 C. B. N. S. 55: *Phillips* v. *Eyre*, L. R. 4 Q. B. 225.

imprisonment consequent thereon, do not bar an indictment for manslaughter against the defendant, should the person assaulted afterwards die from the effects of the assault, for "the form and the intention of the common law pleas of *autrefois convict* and *autrefois acquit* show that they apply only where there has been a former judicial decision on the same accusation in substance, and where the question in dispute has been already decided" (*q*). If there be a continuing breach by a workman of a contract to serve his master, the servant may, under the stat. 4 Geo. 4, c. 34, s. 8, be convicted more than once of the offence thereby constituted (*r*).

(*q*) *Reg.* v. *Morris*, L. R. 1 C. C. 90, 94.

(*r*) *Unwin* v. *Clarke*, L. R. 1 Q. B. 417. See also *Allen* v. *Worthy*, L. R. 5 Q. B. 163; *Ex parte Short*, *Id.* 174.

CHAPTER VI.

ACQUISITION, ENJOYMENT, AND TRANSFER OF PROPERTY.

In the present chapter are contained three sections, which treat respectively of the acquisition, enjoyment, and transfer of property. In connection with the first-mentioned of these subjects, one maxim only has been considered, which sets forth the general principle, that title is acquired by priority of occupation; a principle so extensively applicable, and embracing so wide a field of inquiry, that the following pages will be found to present to the reader little more than a mere outline of a course of investigation, which, if pursued in detail, would prove alike interesting and instructive. It is, indeed, only proper to observe *in limine*,—since, from the titles which have been selected with a view to showing clearly the mode of treatment adopted, much more might reasonably be expected in the ensuing pages than has been attempted,—that a succinct statement of the more important only of the rights, liabilities, and incidents annexed to property has here been offered; so that a perusal of the contents of this chapter may prove serviceable in recalling the attention of the *practitioner* to the application and illustration of principles with which he must necessarily have been previously familiar; and may, without wearying his attention, direct the *student* to sources of information whence may be derived more copious and accurate supplies of knowledge.

§ I.—THE MODE OF ACQUIRING PROPERTY.

QUI PRIOR EST TEMPORE POTIOR EST JURE. (*Co. Litt.* 14 *a.*)—*He has the better title who was first in point of time.*

Title by priority of occupation.

The title of the finder to unappropriated land or chattels must evidently depend either upon the law of nature, upon international law, or upon the laws of that particular community to which he belongs. According to the law of nature, there can be no doubt that priority of occupancy alone constitutes a valid title, *quod nullius est id ratione naturali occupanti conceditur* (*a*); but this rule has been so much restricted by the advance of civilization, by international laws, and by the civil and exclusive ordinances of each separate state, that it has comparatively little practical application at the present day. It is, indeed, true, that an unappropiated tract of land, or a desert island, may legitimately be seized and reduced into possession by the first occupant, and, consequently, that the title to colonial possessions may, and in some cases does, in fact, depend upon priority of occupation. But within the limits of this country, and between subjects, it is apprehended that the maxim which we here propose to consider, has no longer any direct application as regards the acquisition of title to realty by entry and occupation. It is, moreover, a general rule, that whenever the owner or person actually seised of land dies

(*a*) D. 41. 1. 3; I. 2. 1. 12.

intestate and without heir, the law vests the ownership of such land either in the Crown (*b*), or in the subordinate lord of the fee by escheat (*c*); and this is in accordance with the spirit of the ancient feudal doctrine expressed in the maxim, *Quod nullius est, est domini regis* (*d*).

On the maxim, *Prior tempore, potior jure*, may depend, however, the right of property in treasure trove, in wreck, derelicts (*e*), waifs, and estrays, which, being *bona vacantia*, belong by the law of nature to the first occupant or finder, but which have, in some cases, been annexed to the supreme power by the positive laws of the state (*f*). "There are," moreover, "some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such that nothing but an usufructuary property is capable of being had in them; and therefore they still belong to the first occupant during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences. Such, also, are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untameable disposition (*g*):

(*b*) So, "there is no doubt that, by the law of the land the Crown is entitled to the undisposed-of *personal estate* of any person who happens to die without next of kin:" 14 Sim. 18; *Robson* v. *A.-G.*, 10 Cl. & Fin. 497; *Dyke* v. *Walford*, 5 Moore, P. C. C. 434.

(*c*) 2 Com. by Broom & Hadley, 394.

(*d*) Fleta, lib. 3; Bac. Abr., "*Prerogative*" (B).

(*e*) Goods are "'derelict' which have been voluntarily abandoned and given up as worthless, the mind of the owner being alive to the circumstances at the time;" *per* Tindal, C. J., *Legge* v. *Boyd*, 1 C. B. 112.

(*f*) The reader is referred for information on these subjects to 2 Com. by Broom & Hadley, Chap. XXVI.

(*g*) See *Rigg* v. *Earl of Lonsdale*, 1 H. & N. 923; S. C., 11 Exch. 654;

which any man may seize upon, and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but, if once they escape from his custody or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards" (*h*).

So, the finder of a chattel lying apparently without an owner may, by virtue of the maxim under notice, acquire a special property therein (*i*).

Valid title against a wrong doer.

As against a wrong-doer, mere right to possession constitutes a valid title, and the former cannot set up the *jus tertii* against one whose claim to the goods in question rests on possession and nothing more (*k*).

In accordance with the maxim *Qui prior est tempore, potior est jure,* the rule in descents is, that amongst males of equal degree the eldest shall inherit land in preference to the others, unless, indeed, there is a particular custom to the contrary; as in the case of gavelkind, by which

followed in *Blades* v. *Higgs*, 12 C. B. N. S. 501; *Morgan* v. *Earl of Abergavenny*, 8 C. B. 768; *Ford* v. *Tynte*, 31 L. J., Chanc., 177; *Hannam* v. *Mockett*, 2 B. & C. 934; *Ibottson* v. *Peat*, 3 H. & C. 644.

(*h*) 2 Com. by Broom & Hadley, 12; Wood, Civ. L., 3rd ed., 82; *Holden* v. *Smallbrooke*, Vaugh. 187. See *Acton* v. *Blundell*, 12 M. & W. 324, 333; Judgm., *Embrey* v. *Owen*, 6 Exch. 369, 372; *Chasemore* v. *Richards*, 2 H. & N. 168; S. C. 7 H. L. Cas. 349.

(*i*) *Armory* v. *Delamirie*, 1 Stra. 504 (cited, *White* v. *Mullett*, 6 Exch. 7; and distinguished in *Buckley* v. *Gross*, 3 B. & S. 564); *Bridges* v. *Hawkesworth*, 21 L. J., Q. B., 75. See also *Waller* v. *Drakeford*, 1 E. & B. 749; *Mortimer* v. *Cradock* (C. P.), 7 Jur. 45; *Merry* v. *Green*, 7 M. & W. 623.

"There is no authority," however, "nor sound reason for saying that the goods of several persons which are accidentally mixed together thereby absolutely cease to be the property of their several owners, and become *bona vacantia*." Judgm., *Spence* v. *Union Marine Ins. Co.*, L. R. 3 C. P. 438; *ante*, p. 279.

(*k*) *Jeffries* v. *Great Western R. Co.*, 5 Ell. & Bl. 806.

land descends to all the males of equal degree together; or borough English, according to which the youngest son and not the eldest, succeeds on the death of his father, or burgage tenure, which prevails in certain towns, and is characterised by specicial customs (*l*). Where A. had three sons, B., C., and D., and D., the youngest, died, leaving a daughter, E., and then A. purchased lands in borough English, and died, it was held, in accordance with the custom, that the lands should go to E. (*m*). The right of primogeniture above-mentioned does not, however, exist amongst females, and, therefore, if a person dies possessed of land, leaving daughters only, they will take jointly as co-parceners (*n*).

Real property—conflicting rights.

So, where there are conflicting rights as to real property, courts of equity will inquire, not which party was first in possession, but under what instrument he was in possession, and when his right is dated in point of time; or, if there be no instrument, they will ask when did the right arise—who had the prior right (*o*)? It forms, moreover, the general rule between encumbrancers and purchasers, that he whose assignment of an equitable interest in a fund is first in order of time, has, by virtue of that circumstance alone, the better right to call for the possession of the fund (*p*). This rule prevails amongst mortgagees, who

(*l*) 2 Com. by Broom & Hadley, 168, 170, 383. See *Muggleton* v. *Barnett*, 1 H. & N. 282; S. C., 2 *Id.* 653.

(*m*) *Clements* v. *Scudamore*, 2 Ld. Raym. 1024.

(*n*) 2 Com. by Broom & Hadley, 356, 385. In *Godfrey* v. *Bullock*, 1 Roll. 623, n. (3); cited 2 Ld. Raym. 1027; the custom was, that, in default of issue male the eldest daughter should have the land.

(*o*) Argument of Sir E. Sugden in *Cholmondeley* v. *Clinton*, 2 Meriv. 239; *Scott* v. *Scott*, 4 H. L. Cas. 1065, 1082.

(*p*) "Grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities, and the maxim applies *Qui prior est tempore, potior est in jure.* The first grantee is *potior*, that is *poten-*

are considered purchasers *pro tanto;* and where, therefore, of three mortgages, the first is brought in by the owner of the third, such third mortgagee thereby acquires the legal title, and, having thus got the law on his side, with equal equity will be permitted to tack the first and third mortgages together to the exclusion of the second (*q*), provided that at the time the third mortgagee took his mortgage he had no notice of the mesne incumbrance. Thus the priority of equitable titles may be changed by the diligence of one of the claimants in obtaining the legal estate to himself, or to a trustee, for the protection of his equitable interest (*r*).

It will, however, be borne in mind that the doctrine of tacking only applies where the legal has been annexed to the equitable estate in the manner above indicated; where, therefore, the legal estate is outstanding, the several incumbrancers will be paid off according to their actual priority in point of time, and in strict accordance with the maxim, *Prior tempore, potior jure* (*s*). Indeed, it may be laid down as a general rule that, as between mere equitable claims, equity will give no preference, and

tior. He has a better and superior, because a prior equity;" *per* Lord Westbury, C., *Phillips* v. *Phillips*, 31 L. J., Chanc., 325.

(*q*) An experimental statute was passed by which protection and priority by legal estates and tacking were not to be allowed in the future, see 37 & 38 Vict. c. 78, s. 7; but this statute was repealed by 38 & 39 Vict. c. 87, s. 129. *Willoughby* v. *Willoughby*, 1 T. R. 773, 774; *Robinson* v. *Davison*, 1 Bro. C. C., 5th ed., 61; *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491; 1 My. & K. 297; 2 Sim. 257. See *Hopkinson* v. *Rolt*, 9 H. L. Cas. 514. "The doctrine of tacking is founded on an application of the equitable maxims—that *he who seeks equity shall do equity to the person from whom he requires it*—and *where equities are equal the law shall prevail.*" See Coote Mort., 4th ed., 828.

(*r*) 3 Prest. Abs., Tit. 274, 275.

(*s*) *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491, 495; cited, *per* Lord Hardwicke, C., *Willoughby* v. *Willoughby*, 1 T. R. 773.

mortgages, judgments, statutes, and recognizances will be alike payable, according to their respective priority of date (*t*). We may add, also, that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the fund upon which it attaches, unless such lien either be intrinsically defective, or be displaced by some act of the party holding it, which may operate in a court of law or equity to postpone his right to that of a subsequent claimant (*u*). This doctrine (of tacking) applies equally to personal as to real property (*x*).

Bottomry bonds.

Bottomry bonds form an exception to the rule. If bonds are given at different periods of the voyage, and the value of the ship is insufficient to discharge them all, the last in point of date is entitled to priority of payment over the next of an earlier creation, because the last loan has furnished the means of preserving the ship, and without it the former lenders would have entirely lost their security (*y*).

Mortgagee and tenant.

A mortgagee may, subject to the statute 44 & 45 Vic. c. 41. s. 18, recover in ejectment, without previously giving notice to quit, against a tenant who claims under a lease from the mortgagor, granted *after* the mortgage, and without the privity of the mortgagee; for the tenant stands exactly in the place of the mortgagor, and the possession of the mortgagor cannot be considered as holding out a false appearance, since it is of the very nature of the transaction that the mortgagor should continue in possession; and whenever one of two innocent parties must be a loser, then the rule applies, *Qui prior est tempore, potior est jure.* If, in the instance just given,

(*t*) Coote, Mortg., 4th ed., 822–3.

(*u*) See Judgm., *Rankin* v. *Scott*, 12 Wheat. (U. S.), R. 179.

(*x*) Coote on Mortgages, 4th ed., 814.

(*y*) Abbott on Shipping, 12th ed., 117.

one party must suffer, it is he who has not used due diligence in looking into the title (*z*).

Maxim applied to bills of sale and delivery orders.

The maxim has also been recognised by statute in determining the priorities of the holders of two or more bills of sale given in respect of the same goods. Thus, under the provisions of the statutes relating to bills of sale it has been held (*a*) that a registered bill of sale takes precedence over an antecedent, but unregistered bill of sale given in respect of the same goods, and that too in cases where the grantee of the unregistered bill of sale has seized and is in possession; registration of a bill of sale being a necessary antecedent step to making a perfect title to the goods contained in it. Delivery orders, not operating of themselves to pass the property in the goods they represent, and requiring, in order to perfect the holder's title, to be lodged with the wharfinger at whose wharf or warehouse the goods are deposited, who must by some act recognise the title of the holder to them (known as an attornment), likewise illustrate the maxim. The following case bears upon the subject under consideration. D. purchased goods of C. & Co. as agent for his undisclosed principals B. & Co., and thereby became liable for their price to C. & Co. A delivery order for the goods deliverable to the order of D. being signed by C. & Co., was endorsed by D. to B. & Co., who subsequently endorsed the same to the plaintiffs as security for an advance. The plaintiffs sent this order to the defendants, the warehouse-

(*z*) *Keech* v. *Hall*, Dougl. 21. See Judgm., *Dearle* v. *Hall*, 3 Russ. R. 20. As to the relation of mortgagor and mortgagee, see, further, Judgm., *Trent* v. *Hunt*, 9 Exch. 21, 22; followed in *Snell* v. *Finch*, 13 C. B. N. S. 651; *Moss* v. *Gallimore*, 1 Smith, L. C., and Note thereto; *Hickman* v. *Machin*, 4 H. & N. 716, 722, and see 44 & 45 Vic. c. 44, s. 18.

(*a*) *Conelly* v. *Steer*, 50 L. J. Q. B. Div. 326; *Lyons* v. *Tucker*, 7 Q. B. Div. 523; 50 L. J. Q. B. Div. 661.

men of the goods, with a written memorandum that the defendants were to hold the goods to the plaintiffs' order. One hour before the plaintiffs' order was received at the defendants proper office, D., who had paid C. & Co. for the goods in consequence of B. & Co. having failed, and who was therefore in the position of an unpaid vendor, presented another delivery order signed by C. & Co. at the proper office of the defendants, who made out a dock warrant for the goods in the name of C. & Co., which was endorsed to D. It was held, in an action by the plaintiffs against the warehousemen for non-delivery of the goods to them, that the title to the goods was in D.(*b*).

Priority of execution.

We may further observe, that the respective rights of execution creditors *inter se* (*c*), must often be determined by applying the maxim as to priority under consideration. For instance, where two writs of execution against the same person are delivered to the sheriff, he is bound to execute that writ first which was first delivered to him (*d*); unless, indeed, the first writ or the possession held under it were fraudulent, in which case the latter shall have priority; and where goods seized under a *fi. fa.* founded on a judgment fraudulent against creditors remain in the sheriff's hands, or are capable of being seized by him, he ought to sell, or seize and sell, such goods under a subsequent writ of *fi. fa.* founded on a *bonâ fide* debt (*e*). Where, moreover, a party is in possession of

(*b*) *Imperial Bank* v. *London and St. Katherine's Docks Co.*, 5 Ch. Div. 195.

(*c*) See *Anderson* v. *Radcliffe*, E. B. & E. 806.

(*d*) *Per* Ashhurst, J., *Hutchinson* v. *Johnston*, 1 T. R. 131; Judgm., *Drewe* v. *Lainson*, 11 A. & E. 537; *Jones* v. *Atherton*, 7 Taunt. 56; 29 Car. 2, c. 3, s. 16. See *Aldred* v. *Constable*, 6 Q. B. 370.

(*e*) *Christopherson* v. *Burton*, 3 Exch. 160; *Shattock* v. *Carden*, 6 Exch. 725; *Imray* v. *Magnay*, 11 M. & W. 267; *Drewe* v. *Lainson*, 11 A. & E. 529.

goods apparently the property of a debtor, the sheriff who has a *fi. fa.* to execute is bound to inquire whether the party in possession is so *bonâ fide*, and, if he find that the possession is held under a fraudulent or an unregistered (*f*) bill of sale, he is bound to treat it as null and void, and levy under the writ (*g*).

By the stat. 19 & 20 Vict. c. 97, s. 1, "no writ of *fieri facias* or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bonâ fide* and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ;" provided such person had not, at the time when he acquired such title, notice that such or any other writ of execution or attachment had been delivered to and remained unexecuted in the hands of the sheriff (*h*).

Patents.

We may, in the next place, observe, that the law relative to patents and to copyright is altogether referable to the above maxim as to priority. With respect to patents, the general rule is, that the orignal inventor of a machine, who has first brought his invention into actual use, is entitled to priority as patentee, and that consequently a subsequent original inventor will be unable to avail himself of his invention; and this is evidently in accordance with the strict rule, *qui prior est tempore, potior est jure* (*i*). If, therefore, several persons simultaneously discover the same thing, the party first communicating it to the public under the protection of the patent

(*f*) See *Richards* v. *James*, L. R. 2 Q. B. 285.

(*g*) *Lovick* v. *Crowder*, 8 B. & C. 165, 137; *Warmoll* v. *Young*, 5 B. & C. 660, 666. See, also, the cases cited, Arg. 12 M. & W. 664.

(*h*) See *per* Mellor, J., *Hobson* v. *Thelluson*, L. R. 2 Q. B. 651.

(*i*) See 3 Wheaton (U. S.), R. App. 24.

becomes the legal inventor, and is entitled to the benefit of it (*j*).

A person, however, to be entitled to a patent for an invention must be *the first and true inventor* (*k*); so that, if there be any public user thereof by himself or others prior to the granting of the patent (*l*), or if the invention has been previously made public in this country by a description contained in a work, whether written or printed, which has been publicly circulated, one who afterwards takes out a patent for it will not be considered as the true and first inventor within the meaning of the stat. 21 Jac. 1, c. 3, even though, in the latter case, he has not borrowed his invention from such publication (*m*). But a communication from abroad of a manufacture openly published there, which may be the subject of a patent in this country, and an importer of an invention from abroad is an inventor within 5 & 6 Wm. 4, c. 83 (*n*).

It has been recently decided that a communication made in England by one British subject to another of an invention never published in this country does not make the person to whom the invention is communicated the first and true inventor (*o*).

Although, moreover, it is generally true that a new principle, or *modus operandi*, carried into practical and useful

(*j*) *Per* Abbott, C.J., *Forsyth* v. *Riviere*, Webs. Pat. Cas. 97, note; *per* Tindal, C.J., *Cornish* v. *Keene*, *Id.* 508.

(*k*) See Norman Pat. Chap. 8.

(*l*) *The Househill Coal and Iron Co.* v. *Neilson*, 9 Cl. & Fin. 788. See *Brown* v. *Annandale*, Webs. Pat. Cas. 433. And generally, in regard to the question, what is such prior user as will avoid a patent, see Norman Pat. Chap. 5.

(*m*) *Stead* v. *Williams*, 7 M. & Gr. 818; *Stead* v. *Anderson*, 4 C. B., 806. See *Booth* v. *Kennard*, 2 H. & N. 84. See Patent Act, 1883, 46 & 47 Vict. c. 57, s. 33, *et seq.*

(*n*) Claridge's Patent, *In re*, 7 Moo. P. C. C. 394.

(*o*) *Marsden* v. *The Saville Street Foundry and Engineering Co., Ld.*, 3 Ex. Div. 203; S. C. 39 L. T. 97.

effect by the use of new instruments, or by a new combination of old ones, is an original invention, for which a patent may be supported (*p*); yet, if a person merely substitutes, for part of a patented invention, some well-known equivalent, whether chemical or mechanical, this, being in truth but a colourable variation, will amount to an infringement of the patent (*q*); and where letters patent were granted for improvements in apparatus for the manufacture of certain chemical substances, and the jury found that the apparatus was not new, but that the patentee's mode of connecting the parts of that apparatus was new, the Court, in an action for an alleged infringement of the patent, directed the verdict to be entered for the defendant, upon an issue taken as to the novelty of the invention (*r*); and "no sounder or more wholesome doctrine" in reference to this subject was ever established than that a patent cannot be had "for a well-known mechanical contrivance merely when it is applied in a manner or to a purpose which is not quite the same, but is analogous to the manner or the purpose in or to which it has been hitherto notoriously used" (*s*).

"A copyright is the exclusive right of multiplying Copyright.

(*p*) *Boulton* v. *Bull*, 2 H. Bla. 463; S. C., 8 T. R. 95; *Hall's case*, Webs. Pat. Cas. 98; cited, *per* Lord Abinger, C.B., *Losh* v. *Hayne*, *Id.* 207, 208; *Holmes* v. *London & North Western R. C.*, 12 C. B. 831, 851. See *Tetley* v. *Easton*, 2 C. B. N. S. 106; *Patent Bottle Envelope Co.* v. *Seymer*, 5 *Id.* 164.

(*q*) See *Heath* v. *Unwin*, 13 M. & W. 583; S. C., 12 C. B. 522; 5 H. L. Cas. 505. And see further on this subject, *Newton* v. *Grand Junction R. C.*, 5 Exch. 331; *Newton* v. *Vaucher*, 6 Exch. 859.

(*r*) *Gamble* v. *Kurtz*, 3 C. B. 425.

(*s*) *Per* Lord Westbury, C., *Harwood* v. *Great Northern R. C.*, 11 H. L. Cas. 682.

As to an extension of the term of letters patent see the Patent Act, 1883, 46 & 47 Vict. c. 57, s. 25, and *in re McDougal's Patent*, L. R. 2 P. C. 1; *In re McInnes Patent*, *Id.* 54.

copies of an original work or composition, and consequently preventing others from so doing" (*t*), the great object of the law of copyright being "to stimulate, by means of the protection secured to literary labour, the composition and publication to the world of works of learning and utility" (*u*); and the right of an author accordingly depends on the same principle as that of a patentee, viz., priority of invention or composition and publication. It was, indeed, at one time thought that a foreigner resident abroad would by first publishing his work in Great Britain acquire a copyright therein (*v*); but this interpretation of the repealed (*x*) stat. 8 Anne, c. 19, was declared by the highest tribunal to be erroneous in *Jefferys* v. *Boosey* (*y*); and it is clear that a foreigner, whether resident here or not, cannot have an English copyright, if he has first published his work abroad, before any publication of it in this country (*z*). And this rule equally applies to dramatic representations abroad, the first representation abroad being held a first publication (*a*). But an alien friend,

(*t*) Judgm., 14 M. & W. 316. See, generally, as to copyright, *Millar* v. *Taylor*, 4 Burr. 2303; *Jefferys* v. *Boosey*, 4 H. L. Cas. 815; S. C., 6 Exch. 580; *Routledge* v. *Low*, L. R. 3 H. L. 100; *Sweet* v. *Benning*, 16 C. B. 459.

The term of copyright in books is now fixed by stat. 5 & 6 Vict. c. 45. See 10 & 11 Vict. c. 95.

As to copyright in works of art, see 25 & 26 Vict. c. 68; *Gambart* v. *Ball*, 14 C. B. N. S. 306; approved in *Graves* v. *Ashford*, L. R. 2 C. P. 410.

(*u*) *Per* Lord Cairns, C., L. R. 3 H. L. 108.

(*v*) See the cases cited, 4 H. L. Cas. 959, 960, 974.

(*x*) See 5 & 6 Vict. c. 45, s. 1.

(*y*) 4 H. L. Cas. 815, where the cases bearing on the above subject are collected.

(*z*) *Chappell* v. *Purday*, 14 M. & W. 303; *Boucicault* v. *Delafield*, 33 L. J., Chanc., 38. See *Beard* v. *Egerton*, 3 C. B. 97; 7 Vict. c. 12, s. 19; 15 & 16 Vict. c. 12.

(*a*) *Boucicault* v. *Delafield*, 1 H. & M. 597; *Boucicault* v. *Chatterton*, 5 Ch. Div. 267; 46 L. J. Ch. 305.

who, during his temporary residence in a British colony, publishes in the United Kingdom a book of which he is the author, is, under the stat. 5 & 6 Vict. c. 45, entitled to the benefit of English copyright (*b*).

§ II.—PROPERTY—ITS RIGHTS AND LIABILITIES.

In this section are contained remarks upon the legitimate mode of enjoying property, the limits and extent of that enjoyment, and the rights and liabilities attaching to it. The maxims commented upon, in connection with this subject, are four in number: that a man shall so use his own property as not to injure his neighbour (*c*); that the owner of the soil is entitled likewise to that which is above and underneath it; that what is annexed to the freehold becomes, in many cases, subject to the same rights of ownership; that "every man's house is his castle."

SIC UTERE TUO UT ALIENUM NON LÆDAS. (9 *Rep.* 59.)—*Enjoy your own property in such a manner as not to injure that of another person* (*d*).

Injuries caused by

A man must enjoy his own property in such a manner

(*b*) *Routledge* v. *Low*, L. R. 3 H. L. 100.

(*c*) For a good example see *Crowhurst* v. *Amersham Burial Board*, 4 Ex. D. 5.

(*d*) Such is the literal translation of the above maxim; its true legal meaning would rather be, "So use your own property as not to injure *the rights* of another." See Arg. *Jeffries* v. *Williams*, 5 Exch. 797.

The maxim is cited, commented on, or applied, in *Bonomi* v. *Backhouse*, E. B. & E. 637, 639, 643; S. C., 9 H. L. Cas. 511 (in connection with which see *Smith* v. *Thackerah*, L. R. 1 C. P. 564); *Chasemore* v. *Richards*,

a wrongful use of property.

as not to invade the legal rights of his neighbour—*Expedit reipublicæ ne suâ re quis male utatur* (*e*). "Every man," observed Lord *Truro* (*f*), "is restricted against using his property to the prejudice of others;" and, as further remarked by the same learned Lord, "the principle embodied in the maxim, *Sic utere tuo ut alienum non lædas*, applies to the public in at least as full force as to individuals. There are other maxims equally expressive of the principle—*Nihil quod est inconveniens est licitum* (*g*), and *Salus reipublicæ suprema lex*" (*h*); to so large a class of cases, indeed, and under circumstances so dissimilar, is the rule before us capable of being applied, that we can here merely suggest some few leading illustrations of it, omitting references to many reported decisions which might be found, perhaps, equally well to exemplify its meaning.

In the first place, then, we must observe that the invasion of an established right will in general, *per se*, constitute an injury, for which damages are recoverable; for in all civil acts our law does not so much regard the intent of the actor as the loss and damage of the party suffering. In trespass *qu. cl. fr.*, the defendant pleaded, that he had land adjoining plaintiff's close, and upon it a hedge of thorns; that he cut the thorns, and that they, *ipso invito*, fell upon the plaintiff's land, and the defendant took them off as soon as he could, which was the same trespass, &c. On demurrer, judgment was given for the plaintiff, on the ground that, though a man do a

7 H. L. Cas. 388; *per* Pollock, C.B., *Bagnall* v. *London & North-Western R. C.*, 7 H. & N. 440; *In re Groucott* v. *Williams*, 4 B. & S. 149, 155–6.

(*e*) I. 1. 8. 2.

(*f*) *Egerton* v. *Earl Brownlow*, 4 H. L. Cas. 195.

(*g*) *Ante*, p. 178.

(*h*) *Ante*, pp. 179, *et seq.*

lawful thing, yet, if any damage thereby befalls another, he shall be answerable, if he could have avoided it (*i*). So, where the defendants, a burial board, planted on their own land, and about four feet distant from their boundary railings, a yew tree, which grew through and beyond the railings, so as to project over an adjoining meadow hired by the plaintiff for pasture. The plaintiff's horse, feeding in the meadows, ate of that portion of the yew tree which projected over the meadows, and died of the poison contained in it. The tree was planted and grown with the knowledge of the defendants. The plaintiff having brought an action for the value of the horse, held that the defendants were liable (*k*).

Accordingly, in considering whether a defendant is liable to a plaintiff for damage which the latter may have sustained, the question in general is, not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage: and this doctrine is founded on good sense. For when one person in managing his own affairs causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non lædat alienum* (*l*).

(*i*) See *Lambert* v. *Bessey*, T. Raym. 422; *Weaver* v. *Ward*, Hob. 134; *per* Blackstone, J., *Scott* v. *Shepherd*, 3 Wils. 403; *per* Lord Kenyon, C.J., *Haycraft* v. *Creasy*, 2 East, 104; *Turberville* v. *Stampe*, 1 Ld. Raym. 264; cited *Jones* v. *Festiniog R. C.*, L. R. 3 Q. B. 735; recognised *Vaughan* v. *Menlove*, 3 Bing. N. C. 468; *Piggott* v. *Eastern Counties R. C.*, 3 C. B. 229; *Grocers' Co.* v. *Donne*, 3 Bing. N. C. 34; *Aldridge* v. *Great Western R. C.*, 4 Scott, N. R. 156.

(*k*) *Crowhurst* v. *The Burial Board of the Parish of Amersham*, 4 Ex. Div. 5; 48 L. J. Ex. 109; *Hurdman* v. *N. E. R. Co.*, 3 C. P. D. 168; 47 L. J. C. P. 368.

(*l*) *Per* Lord Cranworth, *Rylands* v. *Fletcher*, L. R. 3 H. L. 341, citing *Lambert* v. *Bessey*, *supra*, n. (*i*).

In the next place, it may be laid down, as a true proposition, that, although bare negligence unproductive of damage to another will not give a right of action, negligence causing damage will do so (*m*); negligence being defined to be "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do" (*n*); negligence, moreover, not being "absolute or intrinsic," but "always relative to some circumstances of time, place, or person" (*o*).

Having thus premised, the following instances will serve to show in what manner the maxim which we have placed at the head of these remarks is applied, to impose restrictions, first, upon the enjoyment of property (*p*),

(*m*) See Broom's Com., 4th ed., 656; *Whitehouse* v. *Birmingham Can. Co.*, 27 L. J. Ex. 25; *Bayley* v. *Wolverhampton Waterworks Co.*, 6 H. & N. 241; *Duckworth* v. *Johnson*, 4 H. & N. 653.

(*n*) *Per* Alderson, B., *Blyth* v. *Birmingham Waterworks Co.*, 11 Exch. 784. See also *Heaven* v. *Pinder*, 11 Q. B. D. 503.

Laches has been defined to be "a neglect to do something which by law a man is obliged to do;" *per* Lord Ellenborough, C.J., *Sebag* v. *Abitbol*, 4 M. & S. 462; adopted *per* Abbott, C.J., *Turner* v. *Hayden*, 4 B. & C. 2.

(*o*) Judg., *Degg* v. *Midland R. C.*, 1 H. & N. 781; approved in *Potter* v. *Faulkner*, 1 B. & S. 800. As to proof of negligence, *ante*, p. 298; *Assop* v. *Yates*, 2 H. & N. 768; *Perren* v. *Monmouthshire R. C.*, 11 C. B. 855; *Vose* v. *Lancashire and Yorkshire R. C.*, 2 H. & N. 728; *Harris* v. *Anderson*, 14 C. B. N. S. 499; *Reeve* v. *Palmer*, 5 C. B. N. S. 84; *Manchester, &c., R. C.*, app., *Fullarton*, resp., 14 C. B. N. S. 54; *Roberts* v. *Great Western R. C.*, 4 C. B. N. S. 506; *North* v. *Smith*, 10 C. B. N. S. 572; *Manley* v. *St. Helen's Canal and R. C.*, 2 H. & N. 840; *Willoughby* v. *Horridge*, 12 C. B. 742; *Templeman* v. *Haydon*, *Id.* 507; *Melville* v. *Doidge*, 6 C. B. 450; *Grote* v. *Chester and Holyhead R. C.*, 2 Exch. 251; *Dansey* v. *Richardson*, 3 E. & B. 144; *Roberts* v. *Smith*, 2 H. & N. 213; *Cashill* v. *Wright*, 6 E. & B. 891; *Holder* v. *Soulby*, 8 C. B. N. S. 254.

(*p*) See *per* Holt, C.J., *Tenant* v.

and secondly, upon the acts and conduct of each individual member of the community. In illustration of the first branch of the subject, we may observe, that, if a man builds a house so close to mine that his roof overhangs mine, and throws the water off upon it, this is a nuisance, for which an action will lie (*q*). So, an action will lie, if, by an erection on his own land, he obstructs my ancient lights and windows; for a man has no right to erect a new edifice on his ground so as to prejudice what has long been enjoyed by another (*r*)—*ædificare in tuo proprio solo non licet quod alteri noceat* (*s*). In like manner, if a man, in pulling down his house, occasion damage to, or accelerate the fall of, his neighbour's, he will be liable, provided there was negligence on the part of those engaged in pulling down the house; and he will not be exonerated from liability by employing a competent contractor to do the work in question; therefore, where the defendant and the plaintiff occupied adjoining houses, and the defendant rebuilt his house, and employed a competent builder and architect for that purpose, and in the course of the work the workmen employed by the builder began to fix a staircase, and in so doing negligently, and without the knowledge of the defendant or his architect, cut into a party wall dividing the defendant's house from the house of the plaintiff, and thereby injured the plain-

Injury to neighbour's house.

Goldwin, 2 Ld. Raym. 1092–3, followed in *Hodgkinson* v. *Ennor*, 4 B. & S. 241.

(*q*) *Penruddocke's case*, 5 Rep. 100; *Fay* v. *Prentice*, 1 C. B. 828.

(*r*) *Vide per* Pollock, C.B., *Bagnall* v. *London and North Western R. C.*, 7 H. & N. 440; S. C., 1 H. & C. 544, which well illustrates the maxim commented on, *supra*. See *Dodd* v. *Holme*, 1 A. & E. 493; recognised *Bradbee* v. *Mayor, &c., of London*, 5 Scott, N. R. 120; *Partridge* v. *Scott*, 3 M. & W. 220; recognising *Wyatt* v. *Harrison*, 3 B. & Ad. 871; *Brown* v. *Windsor*, 1 Cr. & J. 20.

(*s*) 3 Inst. 201.

tiff's house; it was held that the defendant was liable (*t*). The operation being a hazardous one, the defendant was bound to see that it was carried out with reasonable care and skill, and he could not avoid responsibility by delegating the control of that operation to a third person, however competent that third person might be. It would seem that the defendant's duty in such a case does not go beyond the exercise of reasonable care and skill, and that although the law has been varying somewhat in the direction of treating parties engaged in such a work, as insurers of their neighbours, or warranting them against injury, it has not quite reached that point (*u*).

The mere circumstance of juxtaposition does not, in the absence of any right of easement, render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall, nor is such person, if he be ignorant of the existence of the adjoining wall, bound to use extraordinary caution in pulling down his own (*x*).

Neither is any "obligation towards a neighbour cast by law on the owner of a house, merely as such, to keep it repaired in a lasting and substantial manner: the only duty is to keep it in such a state that his neighbour may not be injured by its fall; the house may, therefore, be

(*t*) *Percival* v. *Hughes*, 9 Q. B. D. 441; 51 L. J. Q. B. 388; 8 App. Cas. 443. See also *Bradbee*, v. *Mayor, &c., of London*, 5 Scott, N. R. 120; *per* Lord Denman, C.J., *Dodd* v. *Holme*, 1 A. & E. 505. See *Peyton* v. *Mayor, &c., of London*, 9 B. & C. 725.

(*u*) *Per* Lord Fitzgerald in *Hughes* v. *Percival*, 8 App. Cas., p. 455.

(*x*) *Chadwick* v. *Trower*, 6 Bing. N. C. 1; reversing S. C., 3 Bing. N. C. 334; cited 5 Scott, N. R. 119; *Grocers' Co.* v. *Donne*, 3 Bing. N. C. 34; *Davis* v. *London and Blackwall R. C.*, 2 Scott, N. R. 74.

See further, as to the right to support by an adjacent house, *Solomon* v. *Vintners' Co.*, 4 H. & N. 585, where the cases are collected.

in a ruinous state, provided it be shored sufficiently, or the house may be demolished altogether" (*y*). Where, however, several houses belonging to the same owner are built together, so that each requires the support of the adjoining house, and the owner parts with one of these houses, the right to such support is not thereby lost (*z*).

As between the owner of the surface of the land and the owner of the subjacent mineral strata, and as between the owners of adjoining mines, questions frequently arise involving a consideration of the maxim, *Sic utere tuo ut alienum non lædas* (*a*), and needing an interpretation of it not too much infringing on the rights of ownership. In *Humphries* v. *Brogden* (*b*), the plaintiff, being the occupier of the surface of land, sued the defendant in case, for negligently and improperly, and without leaving any sufficient pillars and supports, and contrary to the custom of mining in that district, working the subjacent minerals, *per quod* the surface gave way. Issue being joined on a plea of not guilty to this declaration, it was proved at the trial that plaintiff was in occupation of the surface, which was not built upon, and defendant of the subjacent minerals, but there was no evidence showing how the occupation of the superior and inferior strata came into different hands. The jury found that the defendant had

(*y*) Judgm., *Chauntler* v. *Robinson*, 4 Exch. 170. As to the right of support for a sewer, see *Metropolitan Board of Works* v. *Metropolitan R. C.*, L. R. 4 C. P. 192; 38 L. J. C. P. 172.

(*z*) *Richards* v. *Rose*, 9 Exch. 218.

(*a*) See *In re Groucott* v. *Williams*, 4 B. & S. 149.

(*b*) 12 Q. B. 739 (with which compare *Hilton* v. *Whitehead*, *Id.* 734); *Haines* v. *Roberts*, 7 E. & B. 625; S. C., 6 E. & B. 643; *Rowbotham* v. *Wilson*, 8 H. L. Cas. 348; S. C., 8 E. & B. 123, 6 *Id.* 593; *Smart* v. *Morton*, 5 E. & B. 30; *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503; S. C., E. B. & E. 503; *Smith* v. *Thackerah*, L. R. 1 C. P. 564; *Blackett* v. *Bradley*, 1 B. & S. 940.

worked the mines carefully and according to the custom, but without leaving sufficient support for the surface. And the Court of Q .B. held, that upon this finding the verdict should be entered for the plaintiff, because of common right the owner of the surface is entitled to support from the subjacent strata.

The *primâ facie* rights and obligations of parties so situated relatively to each other, as above supposed, may, however, be varied by the production of title deeds or other evidence (*c*).

In *Smith* v. *Kenrick* (*d*), the mutual obligations of the owners of adjoining mines were much considered by the Court of C. P., who conclude as follows—that "it would seem to be the natural right of each of the owners of two adjoining coal mines—neither being subject to any servitude to the other—to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from the negligent or malicious conduct of the party." It has accordingly been held that if in consequence of a mine owner on the rise working out his minerals, water comes by natural gravitation into the mines of the owner on the dip, the latter cannot maintain an action if the working is carried on with skill, and in

(*c*) *Per* Lord Campbell, C.J., in *Humphries* v. *Brogden*, and *Smart* v. *Morton*, *supra*; *Rowbotham* v. *Wilson*, *supra*.

See *Solomon* v. *Vintners' Co.*, 4 H. & N. 599, 601.

There is no right such as above considered, to the support of water; *Popplewell* v. *Hodkinson*, L. R. 4 Ex. 248; 38 L. J. Ex. 126.

(*d*) 7 C. B. 15, 564, with which compare *Baird* v. *Williamson*, 15 C. B. N. S. 376, which is distinguished from *Smith* v. *Kenrick*, *supra*, by Lord Cranworth, *Rylands* v. *Fletcher*, L. R. 3 H. L. 341-2; 37 L. J. Ex. 161.

the usual manner (*e*). But if one mine owner in working his own mine diverts a natural watercourse, or causes by artificial means more water to come into his mine than otherwise would come, whereby an adjoining mine is flooded, the mine owner is liable for the damage so caused (*f*).

From the above and similar cases we may infer that much caution is needed in applying the maxim now under our notice—in determining how far it may, on a given state of facts, restrict the mode in which property may be enjoyed or used: a principle here applicable under very dissimilar circumstances being, that "If a man brings or uses a thing of a dangerous nature on his own land, he must keep it in at his own peril, and is liable for the consequences if it escapes and does injury to his neighbour" (*g*). "The person," therefore, "whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir (*h*), or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works (*i*), is damnified without any

(*e*) *Hurdman* v. *North Eastern Railway Co.*, 3 C. P. D. 168; 47 L. J. C. P. 368; *Wilson* v. *Waddell*, 2 App. Cas. 95.

(*f*) *Baird* v. *Williamson*, 15 C. B. N. S. 376; 33 L. J. C. P. 101; *Fletcher* v. *Smith*, 2 App. Cas. 781; 47 L. J. Ex. 4; *Crompton* v. *Lea*, L. R. 19 Eq. 115; 44 L. J. Ch. 69.

(*g*) *Jones* v. *Festiniog R. C.*, L. R. 3 Q. B. 736; 37 L. J. Q. B. 214; *Rylands* v. *Fletcher*, L. R. 3 H. L. 330, 339, 340; 37 L. J. Ex. 161, where many cases illustrating the text are collected.

(*h*) "Suppose A. has a drain through the lands of B. and C., and C. stops up the inlet into his land from B.'s, and A. nevertheless, knowing this, pours water in the drain and damages B., A. is liable to B." Judgm., *Harrison* v. *Great Northern R. C.*, 3 H. & C. 238; *Collins* v. *Middle Level Commissioners*, L. R. 4 C. P. 279; 38 L. J. C. P. 236.

(*i*) *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. Cas. 642.

fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property, which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property" (*k*).

Use of flowing water.

Again, the rule of law which governs the enjoyment of a stream flowing in its natural course over the surface of land belonging to different proprietors is well established, and is illustrative of the maxim under notice. According to this rule, each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, and to use the same as he pleases for any purposes of his own, provided that they be not inconsistent with a similar right in the proprietor of the land above or below: so that neither can any proprietor above diminish the quantity or injure the quality of the water, which would otherwise naturally descend; nor can any proprietor below throw back the water without the licence or the grant of the proprietor above (*l*). Where, therefore, the owner of land applies the stream running through it to the use of a mill newly erected, or to any other purpose, he may, if the stream is diverted

(*k*) Judgm., *Fletcher* v. *Rylands*, L. R. 1 Ex. 280, adopted *per* Lord Cairns, C., in S. C., L. R. 3 H. L. 340; 37 L. J. Ex. 161.

(*l*) *Mason* v. *Hill*, 5 B. & Ad. 1; *Ormerod* v. *Todmorden Joint Stock Mill Co.*, 52 L. J. Q. B., 445; *Wright* v. *Howard*, 1 Sim. & Stu. 190; cited Judgm., 12 M. & W. 349; Judgm., *Embrey* v. *Owen*, 6 Exch. 368–373; *Chasemore* v. *Richards*, 7 H. L. Cas. 349; *Rawstron* v. *Taylor*, 11 Exch. 369; *Broadbent* v. *Ramsbotham*, *Id.* 602. See also *Whalley* v. *Laing*, 3 H. & N. 675, 901; *Hipkins* v. *Birmingham and Staffordshire Gas Light Co.*, 6 H. & N. 250; S. C., 5 *Id.* 74.

or obstructed by the proprietor of land above, recover against such proprietor for the consequential injury to the mill; and the same principle seems to apply where the obstruction or diversion has taken place prior to the erection of the mill, unless, indeed, the owner of land higher up the stream has acquired a right to any particular mode of using the water by prescription, that is, by user continued until the presumption of a grant has arisen (*m*).

What has been just said applies generally to surface water, flowing naturally over land—between which and water so artificially flowing the distinction is important as regards the mode of applying our principal maxim, and was thus recently explained :—

"The flow of a natural stream creates natural rights and liabilities between all the riparian proprietors along the whole of its course. Subject to reasonable use by himself, each proprietor is bound to allow the water to flow on without altering the quantity or quality. These natural rights and liabilities may be altered by grant or by user of an easement to alter the stream, as by diverting, or fouling, or penning back, or the like. If the stream flows at its source by the operation of nature, that is, if it is a natural stream, the rights and liabilities of the party owning the land at its source are the same as those of the proprietors in the course below. If the stream flows at its source by the operation of man, that is, if it is an artificial stream, the owner of the land at its source or the commencement of the flow is not subject to any rights or liabilities towards any other person, in respect of

(*m*) Judgm., *Mason* v. *Hill*, 5 B. & Ad. 25, where the Roman law upon the subject is briefly considered.

the water of that stream. The owner of such land may make himself liable to duties in respect of such water by grant or contract; but the party claiming a right to compel performance of those duties must give evidence of such right beyond the mere suffering by him of the servitude of receiving such water" (*n*).

Rights and liabilities in respect of artificial streams when first flowing on the surface are entirely distinct from rights and liabilities in respect of natural streams so flowing. The water in an artificial stream flowing in the land of the party by whom it is caused to flow is the property of that party, and is not subject to any rights or liabilities in respect of other persons. If the stream so brought to the surface is made to flow upon the land of a neighbour without his consent, it is a wrong, for which the party causing it so to flow is liable. If there is a grant by the neighbour, the terms of the grant regulate the rights and liabilities of the parties thereto. If there is uninterrupted user of the land of the neighbour for receiving the flow as of right for twenty years, such user is evidence that the land from which the water is sent into the neighbour's land has become the dominant tenement having a right to the easement of so sending the water, and that the neighbour's land has become subject to the easement of receiving that water. But such user of the easement of sending on the water of an artificial stream is of itself alone no evidence that the land from which the water is sent has become subject to the servitude of being bound to send on the water to the land of the neighbour below. The enjoyment of the

(*n*) Judgm., *Gaved* v. *Martyn*, 19 C. B. N. S. 759, 760, and cases there cited. See *Nuttall* v. *Bracewell*, L. R. 2 Ex. 1; 36 L. J. 1.

easement is of itself no evidence that the party enjoying it has become subject to the servitude of being bound to exercise the easement for the benefit of the neighbour. * * * A party by the mere exercise of a right to make an artificial drain into his neighbour's land, either from mine or surface, does not raise any presumption that he is subject to any duty to continue his artificial drain by twenty years' user, although there may be additional circumstances by which that presumption could be raised, or the right proved. Also, if it be proved that the stream was originally intended to have a permanent flow, or if the party by whom or on whose behalf the artificial stream was caused to flow is shown to have abandoned permanently, without intention to resume, the works by which the flow was caused, and given up all right to and control over the stream, such stream may become subject to the laws relating to natural streams" (*o*).

But if an artificial water course has existed for a considerable number of years, and is of a permanent nature, it cannot be diverted or unduly lessened in quantity by the owner of the land at its source, or by owners of the land through which it passes to the injury of the owners lower down the stream (*p*); otherwise, if the stream was temporary in its character, as, for instance, created by a pumping-engine used to drain land and was allowed to flow on to the adjoining land under circumstances which negatived an intention to give the use of the artificial stream as a matter of right (*q*).

(*o*) Judgm., *Gaved* v. *Martyn*, 19 C. B. N. S. 758–9, 760, and cases there cited.

(*p*) *Sutcliff* v. *Booth*, 9 Jur. N. S. 1037; *Ivimey* v. *Stocker*, L. R. 1 Ch. App. 396; *Rameshur Pershad Narain Singh* v. *Koorj Behari Pattuk*, 4 App. Cas. 121.

(*q*) *Arkwright* v. *Gell*, 5 M. & W. 232; *Staffordshire* v. *Worcester-*

Subterraneous water.

With respect to water flowing in a subterraneous course, it has been held, that, in this, the owner of land through which it flows has no right or interest (at all events, in the absence of an uninterrupted user of the right for more than twenty years), which will enable him to maintain an action against a landowner, who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first-mentioned owner, and lays his well dry (*r*); for, according to the principle already stated, if a man digs a well in his own land so close to the soil of his neighbour as to require the support of a rib of clay or of stone in his neighbour's land to retain the water in the well, no action would lie against the owner of the adjacent land for digging away such clay or stone, which is his own property, and thereby letting out the water; and it would seem to make no difference as to the legal rights of the parties if the well stands some distance within the plaintiff's boundary, and the digging by the defendant, which occasions the water to flow from the well, is some distance within the defendant's boundary, which is, in substance, the very case above stated (*s*).

Conflicting rights.

The principle which the above instances have been selected to illustrate, likewise applies where various rights, which are at particular times unavoidably inconsistent with each other, are exercised concurrently by different individuals; as, in the case of a highway, where

shire Canal Co. v. *Birmingham Canal Navigation*, L. R. 1 H. L. 254; 35 L. J. Ch. 757.

(*r*) *Acton* v. *Blundell*, 12 M. & W. 324; *Chasemore* v. *Richards*, 2 H. & N. 168 (where see particularly in reference to the maxim *supra*, *per* Coleridge, J., diss.); S. C., 7 H. L. Cas. 349; *South Shields Waterworks Co.* v. *Cookson*, 15 L. Ex. 315.

(*s*) Judgm., 12 M. & W. 352, 353.

right of common of pasture and right of common of turbary may exist at the same time; or of the ocean which, in time of peace, is the common highway of all (*t*); in that of a right of free passage along the street, which right may be sometimes interrupted by the exercise of other rights (*u*); or in that of a port or navigable river (*x*), which may be likewise subject at times to temporary obstruction. In these and similar cases, where such different co-existing rights happen to clash, the maxim, *Sic utere tuo ut alienum non lædas*, will, it has been observed, generally serve as a clue to the labyrinth (*y*). And further, the possible jarring of pre-existing rights can furnish no warrant for an innovation which seeks to create a new right to the prejudice of an old one; for there is no legal principle to justify such a proceeding (*z*).

Not only, moreover, does the law give redress where a substantive injury to property is committed, but, on the same principle, the erection of anything offensive so near Nuisance.

(*t*) *Per* Story, J., *The Marianna Flora*, 11 Wheaton (U.S.), R. 42.

(*u*) See maxim *ubi jus, ibi remedium, ante.*

(*x*) See *Mayor of Colchester* v. *Brooke*, 7 Q. B. 339; *Morant* v. *Chamberlin*, 6 H. & N. 541; *Dobson* v. *Blackmore*, 9 Q. B. 991; *Dimes* v. *Petley*, 15 Q. B. 276; *Reg.* v. *Betts*, 15 Q. B. 1022. As to the liability of the owner of a vessel, anchor, or other thing, which having been sunk in a river obstructs the navigation, see *Brown* v. *Mallett*, 5 C. B. 599, recognised 2 H. & N. 854; *Hancock* v. *York, &c., R. C.*, 10 C. B. 348; *White* v. *Crisp*, 10 Exch. 312; *per* Bovill, C.J., *Vivian* v. *Mersey Docks Board*, L. R. 5 C. P. 29; 39 L. J. C. P. 3; *Bartlett* v. *Baker*, 3 H. & C. 153.

As to the liability of a shipowner for negligently damaging a telegraphic cable, see *Sub-Marine Telegraph Co.* v. *Dickson*, 15 C. B. N. S. 757.

See also *Mersey Docks Trustees* v. *Gibbs*, *Same* v. *Penhallow*, L. R. 1 H. L. 93; *White* v. *Phillips*, 15 C. B. N. S. 245.

(*y*) Judgm., *R.* v. *Ward*, 4 A. & E. 384; Judgm., 15 Johns. (U.S.), R. 218; *Panton* v. *Holland*, 17 *Id.* 100.

(*z*) Judgm., *R.* v *Ward*, *supra.*

the house of another as to render it useless and unfit for habitation is actionable (*a*); the action in such case being founded on the infringement or violation of the rights and duties arising by reason of vicinage (*b*). The doctrine upon this subject, as laid down by the Court of Exchequer Chamber (*c*), and substantially adopted by the House of Lords (*d*), being, "that whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law, an action will lie, whatever the locality may be;" but trifling inconveniences merely are not to be regarded (*e*), for *lex non favet votis delicatorum* (*f*). An action, however, does not lie if a man build a house whereby my prospect is interrupted (*g*), or open a window whereby my privacy is disturbed; in which latter case, the only remedy is to build on the adjoining land opposite to the offensive window (*h*). In these instances the general principle applies—*qui jure suo utitur neminem laedit* (*i*).

(*a*) *Per* Burrough, J., *Deane* v. *Clayton*, 7 Taunt. 497; *Doe* d. *Bish* v. *Keeling*, 1 M. & S. 95. See *Simpson* v. *Savage*, 1 C. B. N. S. 347; *Mumford* v. *Oxford, Worcester, and Wolverhampton R. C.* 1 H. & N. 34.

(*b*) *Alston* v. *Grant*, 3 E. & B. 528; Judgm., 4 Exch. 256, 257.

(*c*) *Bamford* v. *Turnley*, 3 B. & S. 62, 77.

(*d*) *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. Cas. 642.

(*e*) *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. Cas. 644, 655; *Gaunt* v. *Fymney*, L. R. 8 Ch. App. 8; 42 L. J. Ch. 122.

(*f*) 9 Rep. 58 a.

See further as to what may constitute a nuisance. *Reg.* v. *Bradford, Nav. Co.*, 6 B. & S. 631; *Cleveland* v. *Spier*, 16 C. B. N. S. 399.

(*g*) Com. Dig., "*Action upon the Case for a Nuisance*" (C.); *Aldred's case*, 9 Rep. 58. According to the Roman law it was forbidden to obstruct the prospect from a neighbour's house: see D. 8. 2. 3. & 15; Wood, Civ. Law, 3rd ed., 92, 93.

(*h*) *Per* Eyre, C.J., cited 3 Camp. 82. *Jones* v. *Tapling*, 11 H. L. Cas. 290; 34 L. J. C. P. 342.

(*i*) *Vide* D. 50. 17. 151. & 155, § 1.

In connection with the law concerning nuisances, the practitioner may have to decide between asserted rights which are in conflict with each other—the right to erect or maintain, and the right to abate a nuisance—in doing so the following propositions, recently stated (*k*), may guide him. 1. That a person may justify an interference with the property of another for the purpose of abating a nuisance, if that person is the wrongdoer, but only so far as his interference is necessary to abate the nuisance. 2. That it is the duty of a person who enters upon the land of another in abating a nuisance, to do it in the way least injurious to the owner of the land. 3. That where there is an alternative way of abating a nuisance, if one way would cause injury to the property of an innocent third party or to the public, that cannot be justified although the nuisance may be abated by interference with the property of the wrongdoer. Therefore, where the alternative way involves an interference with the property either of an innocent person or of the wrongdoer, the interference must be with the property of the wrongdoer.

Easement of light.

The right to the reception of light in a lateral direction (without obstruction) is an easement. The strict right of property entitles the owner only to so much light (and air) as fall perpendicularly on his land (*l*). The law on this subject formerly was, that no action would lie, unless a right had been gained in the lights by prescription (*m*); but it was subsequently held, that, upon evidence of an

(*k*) *Roberts* v. *Rose*, L. R. 1 Ex. 32; 4 H. & C. 103, 105–6 (in error affirming S. C., 3 H. & N. 162). See further as to abating a nuisance, *Drake* v. *Pywell*, 4 H. & C. 78.

(*l*) Gale on Easements, 5th ed., 319; and in regard to the enjoyment of light and air, see *White* v. *Bass*, 7 H. & N. 722; *Frewen* v. *Philipps*, 11 C. B. N. S. 449.

(*m*) See D. 8. 2. 9.

adverse enjoyment of lights for twenty years or upwards unexplained, a jury might be directed to presume a right by grant or otherwise, even though no lights had existed there before the commencement of the twenty years (*n*): and although, formerly, if the period of enjoyment fell short of twenty years, a presumption in favour of the plaintiff's right might have been raised from other circumstances, it is now enacted by 2 & 3 Will. 4, c. 71, s. 6, that no presumption shall be allowed or made in support of any claim upon proof of the exercise of the enjoyment of the right or matter claimed for less than twenty years; and by sect. 3 of the same statute, that, "when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been *actually enjoyed* (*o*) therewith for the full period of twenty years, *without interruption* (*p*), the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." And by sect. 4, it is further enacted, that "the period of twenty years shall be taken to be the period next before some suit or action wherein the claim shall have been brought into question; and no act or matter shall be deemed to be an interruption within the meaning of the statute, unless the same shall have been submitted, to or acquiesced in, for one year after the party interrupted shall have had notice thereof, and of the person making or authorising the same to be made." The last section of

(*n*) 2 Selw., N. P., 12th ed., 1134.

(*o*) See *Courtauld* v. *Legh*, L. R. 4 Ex. 126.

(*p*) See *Bennison* v. *Cartwright*, 5 B. & S. 1; *Plasterers' Co.* v. *Parish Clerks' Co.*, 6 Exch. 630.

this Act is applicable not only to obstructions preceded and followed by portions of the twenty years, but also to an obstruction ending with that period; and, therefore, a prescriptive title to the access and use of light may be gained by an enjoyment for nineteen years and 330 days, followed by an obstruction for thirty-five days (*q*).

It may be well to add that "every man may open any number of windows looking over his neighbour's land; and, on the other hand, the neighbour may, by building on his own land within twenty years after the opening of the window obstruct the light which would otherwise reach it" (*r*).

Air.

The right to air as distinguished from light appears in some respects to be governed at common law by the same principles as apply to light; but the right to the uninterrupted passage of air across one's neighbour's ground cannot be acquired under the Prescription Act, 2 & 3 Wm. 4, c. 76, s. 2, and it would further seem that no presumption of a grant of such a right will arise from a long and continuous user of the right claimed (*s*). A total deprivation of air would, however, under certain circumstances amount to a nuisance, and as such would be restrained, and in the cases cited below injunctions were granted to prevent and remove obstructions which impeded the ventilation of the plaintiff's premises (*t*).

Liability for negligence.

To the instances already given, showing that, according to the maxim, *Sic utere tuo ut alienum non lædas*, a

(*q*) *Flight* v. *Thomas* (in error), 11 A & E. 688, affirmed 8 Cl. & Fin. 231. See *Eaton* v. *Swansea Waterworks Co.*, 17 Q. B. 267.

(*r*) *Per* Lord Cranworth, *Tapling* v. *Jones*, 11 H. L. Cas. 311; *ante*, p. 362, note (*h*).

(*s*) *Webb* v. *Bird*, 10 C. B. N. S. 268; 13 C. B. N. S. 841.

(*t*) *Gale* v. *Abbot*, 8 Jur. (N. P.) 987; *Dent* v. *Auction Mart Co.*, L. R. 2 Eq. 238.

person is held liable at law for the consequences of his negligence, may be added the following:—It has been held, that an action lies against a party for so negligently constructing a hay-rick on the extremity of his land, that, in consequence of its spontaneous ignition, his neighbour's house was burnt down (*u*). So, the owners of a canal, taking tolls for the navigation, are, by the common law, bound to use reasonable care in making the navigation secure, and will be responsible for the breach of such duty, upon a similar principle to that which makes a shopkeeper, who *invites* (*x*) the public to his shop, liable for neglect in leaving a trap-door open without any protection, by which his customers suffer injury (*y*). The trustees of docks will likewise be answerable for their negligence and breach of duty causing damage (*z*).

Dangerous instruments.

The law also, through regard to the safety of the community, requires that persons having in their custody instruments of danger, should keep them with the utmost care (*a*). Where, therefore, defendant being possessed

(*u*) *Vaughan* v. *Menlove*, 3 Bing. N. C. 468; *Turberville* v. *Stampe*, Ld. Raym. 264; S. C., 1 Salk. 13; *Jones* v. *Festiniog R. C.*, 37 L. J. Q. B. 214; L. R. 3 Q. B. 733. As to liability for fire, caused by negligence, see further, *Filliter* v. *Phippard*, 11 Q. B. 347; *per* Tindal, C.J., *Ross* v. *Hill*, 2 C. B. 889, and 3 C. B. 241; *Smith* v. *Frampton*, 1 Ld. Raym. 62; *Visc. Canterbury* v. *A.-G.*, 1 Phill. 306; *Smith* v. *London and South Western R. C.*, L. R. 5 C. P. 98.

(*x*) See *Nicholson* v. *Lancashire and Yorkshire R. C.*, 3 H. & C. 534; *Holmes* v. *North Eastern R. C.*, L. R. 4 Ex. 254; *Lunt* v. *London and North Western R. C.*, L. R. 1 Q. B. 277, 286.

(*y*) *Parnaby* v. *Lancaster Canal Co.*, 11 A. & E. 223, 243; *Birkett* v. *Whitehaven Junction R. C.*, 4 H. & N. 730; *Chapman* v. *Rothwell*, E. B. & E. 168; *Bayley* v. *Wolverhampton Waterworks Co.*, 6 H. & N. 241; and cases cited, *post*.

(*z*) *Mersey Docks Trustees* v. *Gibbs*, *Same* v. *Penhallow*, L. R. 1 H. L. 93.

(*a*) "The law of England, in its care for human life, requires consummate caution in the person who deals with dangerous weapons;" *per* Erle, C.J., *Potter* v. *Faulkner*, 1 B. & S. 805; *Rylands* v. *Fletcher*, L. R. 3

of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, and a damage accrued to the plaintiff's son in consequence of the girl's presenting the gun at him and drawing the trigger, when the gun went off; it was held, that the defendant was liable to damages in an action on the case (*b*). "If," observed Lord *Denman*, delivering the judgment of the Court of Queen's Bench in another and more recent case, "I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third, and if that injury should be brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first" (*c*). In the case referred to, the evidence showed that the defendant had negligently left his horse and cart unattended in the street; and that plaintiff, a child seven years old, having got upon the cart in play, another child incautiously led the horse on, whereby plaintiff was thrown down and hurt; and, in answer to the argument, that plaintiff could not recover, having, by his own act, contributed to the accident, it was observed that the plaintiff, although acting without prudence or thought, had shown these qualities in as great a degree as he could be expected to possess them, and that his miscon-

H. L. 330, cited *ante*, p. 355, note (*g*), also exemplifies the text.

(*b*) *Dixon* v. *Bell*, 5 M. & S. 198. See also *Clark* v. *Chambers*, 3 Q. B. D. 327.

(*c*) *Lynch* v. *Nurdin*, 1 Q. B. 29, 35, with which compare, *Mangan* v. *Atterton*, L. R. 1 Ex. 239; *Lygo* v. *Newbold*, 9 Exch. 302; *Great Northern R. C.* v. *Harrison*, 10 Exch. 376; *Austin* v. *Great Western R. C.*, L. R. 2 Q. B. 442; *Caswell* v. *Worth*, 5 E. & B. 849.

duct, at all events, bore no proportion to that of the defendant (*d*).

Mischievous animals.

Although a man has a right to keep an animal which is *ferœ naturæ*, and no one can interfere with him in doing so until some mischief happens, yet, as soon as the animal has caused bodily hurt to any person, then the act of keeping it becomes, as regards that person, an act for which the owner is responsible; and there is, in truth, as judicially observed, no distinction between the case of an animal which breaks through the tameness of its nature and is fierce, and *known by the owner to be so*, and one which is *ferœ naturæ* (*e*). "Whoever," says Lord *Denman*, C. J. (*f*) "keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *primâ facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the *keeping* the animal after *knowledge* of its mischievous propensities" (*g*). No proof of the *scienter*, however, need now be given where the complainant sues for hurt done to his *cattle* (*h*) or sheep by the defendant's dog (*i*).

(*d*) *Lynch* v. *Nurdin*, 1 Q. B. 29, 35. See *Waite* v. *North Eastern R. C.*, E. B. & E. 719; *Illidge* v. *Goodwin*, 5 C. & P. 190.

(*e*) *Jackson* v. *Smithson*, 15 M. & W. 563, 565; *May* v. *Burdett*, 9 Q. B. 101. See also *Mason* v. *Keeling*, 1 Lord Raym. 606; *Jenkins* v. *Turner*, *Id.* 109, and cases *infra*.

(*f*) Judgm., 9 Q. B. 110, 111; *Card* v. *Case*, 5 C. B. 622, 633, 634; *Hudson* v. *Roberts*, 6 Exch. 697.

(*g*) See Judgm., 5 H. & N. 685; *Worth* v. *Gilling*, L. R. 2 C. P. 1; *Cox* v. *Burbidge*, 13 C. B. N. S. 430, 437. See *Cooke* v. *Waring*, 2 H. & C. 332.

(*h*) See *Wright* v. *Pearson*, L. R. 4 Q. B. 582; 38 L. J. Q. B. 312.

(*i*) Stat. 28 & 29 Vict. c. 60.

As to damage done by a dog to plaintiff's game, see *Read* v. *Edwards*, 17 C. B. N. S. 245.

The owner of animals *mansuetæ naturæ*, such as oxen, horses, sheep, pigs, and the like, is liable for trespasses committed by them on the land of another without any negligence on his part, for the reason stated by *Brett*, J., in the case of *Ellis* v. *Loftus Iron Co.* (*k*), that the act of the animal is deemed to be the act of its owner so as to constitute a trespass, if the same act if done by the owner would have been a trespass (*l*). A somewhat curious exception to this general rule is where an animal being lawfully driven along a highway strays on to the land or into houses adjoining it. In a recent case an ox belonging to the defendant while being driven through the streets of a country town entered the plaintiff's shop, which adjoined the street, through the open doorway, and damaged his goods. No negligence on the part of the person in charge of the ox was proved. It was held that the defendant was not liable, on the ground apparently that persons who have property adjacent to a highway must be taken to hold it subject to the risk of injury from accidents not caused by negligence, and that this exception to the general rule is one which is absolutely necessary for the conduct of the common affairs of life (*m*).

The above instances (which might easily be extended through a much greater space than it has been thought desirable to occupy), will, it is hoped, suffice to give a general view of the manner in which the maxim, *Sic utere tuo ut alienum non lædas*, is applied in our law to restrict the enjoyment of property, and to regulate in some measure the conduct of individuals, by enforcing

(*k*) L. R. 10 C. P. 10.
(*l*) See also *Lee* v. *Riley*, 18 C. B. N. S. 722; 34 L. J. C. P. 212.
(*m*) *Tillett* v. *Ward*, 10 Q. B. D. 17; 52 L. J. Q. B. 61.

compensation for injuries wrongfully occasioned by a violation of the principle which it involves, a principle which is obviously based in justice, and essential to the peace, order, and well-being of the community. As deducible from the cases cited in the preceding pages, and from others to be found in our Reports, the following propositions may, it is conceived, be stated :—

1. It is, *primâ facie*, competent to any man to enjoy and deal with his own property as he chooses.

2. He must, however, so enjoy and use it as not to affect injuriously the rights of his fellow-subjects.

3. Where rights are such as, if exercised, to conflict with each other, we must consider whether the exercise of the right claimed by either party be not restrained by the existence of some duty imposed on him towards the other. Whether such duty be or be not imposed must be determined by reference to abstract rules and principles of law.

4. A man cannot by his tortious act impose a duty on another.

5. But, lastly, a wrongdoer is not necessarily, by reason of his being such, disentitled to redress by action, as against the party who causes him damage, for sometimes the maxim holds that *Injuria non excusat injuriam* (*n*).

(*n*) This maxim is also sometimes applicable where the action is founded upon contract. See (*ex. gr.*) *Alston* v. *Herring*, 11 Exch. 822, 830; *Hilton* v. *Eckersley*, 6 E. & B. 76; with which *acc. Hornby* v. *Close*, L. R. 2 Q. B. 153; *Farrer* v. *Close*, L. R. 4 Q. B. 602.

CUJUS EST SOLUM EJUS EST USQUE AD CŒLUM. (*Co. Litt.* 4. *a.*)—*He who possesses land possesses also that which is above it* (*o*).

Land, in its legal signification, has an indefinite extent upwards, so that, by a conveyance of land, all buildings, growing timber, and water, erected and being thereupon, shall likewise pass (*p*). So, if a man eject another from land, and afterwards build upon it, the building belongs to the owner of the ground on which it is built, according to the principle *ædificatum solo solo cedit* (*q*), which we shall presently consider. Signification of term "land."

From the maxim *Cujus est solum ejus est usque ad cœlum*, it follows, that a person has no right to erect a building on his own land which interferes with the due enjoyment of adjoining premises, and occasions damage thereto, either by overhanging them, or by the flow of water from the roof and eaves upon them, unless, indeed, a legal right so to build has been conceded by grant, or may be presumed by user, and by operation of the stat. 2 & 3 Will. 4, c. 71. Injury caused by adjoining building.

Where the declaration alleged that the defendant had erected a house upon his freehold, so as to project over the house of the plaintiffs *ad nocumentum liberi tenementi ipsorum*, but did not assign any special nuisance, the Court, on demurrer, held the declaration good, inas-

(*o*) A maxim of general application, *per* Grove, J., *Reg.* v. *Keyn*, 2 Ex. D. 116.

(*p*) Co. Litt. 4, a; 9 Rep. 54; *Allaway* v. *Wagstaff*, 4 H. & N. 307. As to the distinction between "land" and "tenements," see *per* Martin, B., *Electric Telegraph Co.* v. *Overseers of Salford*, 11 Exch. 189; Judgm., *Vauxhall Bridge Co.* v. *Sawyer*, 6 Exch. 508; *Fredericks*, app., *Howie*, resp., 1 H. & C. 381.

(*q*) *Post*, p. 376.

much as the erection must evidently have been a nuisance productive of legal damage (*r*); and, in a modern case, it was held, that the erection of a cornice projecting over the plaintiff's garden was a nuisance, from which the law would infer injury to the plaintiff, and for which, therefore, an action on the case would lie (*s*).

Injury to reversion.

With respect to the nature of the remedy for an injury of the kind to which we are now alluding, not only will an action lie at suit of the occupier, but the reversioner may also sue where injury has been done to the reversion; provided such injury be of a *permanent* character (*t*) or prejudicially affect the plaintiff's reversionary interest (*u*). It is now well settled, that a man may be guilty of a nuisance as well in continuing as in erecting a building on the land of another (*x*).

Where building overhangs plaintiff's land.

Not only will a man be liable who erects a building either upon or so as to overhang his neighbour's land (*y*),

(*r*) *Baten's case*, 9 Rep. 53. See also *Penruddock's case*, 5 Rep. 100.

(*s*) *Fay* v. *Prentice*, 1 C. B. 828; *per* Pollock, C.B., *Solomon* v. *Vintner's Co.*, 4 H. & N. 600.

(*t*) *Simpson* v. *Savage*, 1 C. B. N. S. 347, where the cases are collected. See particularly *Mumford* v. *Oxford, Worcester, and Wolverhampton R. C.*, 1 H. & N. 34; *Battishill* v. *Reed*, 18 C. B. 696; *Cox* v. *Glue*, 5 C. B. 533; *Tucker* v. *Newman*, 11 A. & E. 40; *Jackson* v. *Pesked*, 1 M. & S. 234; *Kidgill* v. *Moor*, 9 C. B. 364; *Bell* v. *Midland R. C.*, 10 C. B. N. S. 287.

As to the distinction between injuries to realty of a permanent and of a merely temporary kind, see also *Hammersmith and City R. C.* v. *Brand*, L. R. 4 H. L. 171; *Ricket* v. *Metropolitan R. C.*, L. R. 2 H. L. 175.

Case will lie by the reversioner for a permanent injury to a chattel let out on hire, *Mears* v. *London and South Western R. C.*, 11 C. B. N. S. 850.

(*u*) *Metropolitan Association* v. *Petch*, 5 C. B. N. S. 504; *Nott* v. *Shoolbred*, L. R. 20 Eq. 22; *Cooper* v. *Crabtree*, 20 Ch. Div. 589; 51 L. J. Ch. 544.

(*x*) *Battishill* v. *Reed*, 18 C. B. 713; citing *Holmes* v. *Wilson*, 10 A. & E. 503; *Thompson* v. *Gibson*, 7 M. & W. 456; *Bowyer* v. *Cook*, 4 C. B., 236.

(*y*) 3 Inst. 201; Vin. Abr., "*Nui-*

but an action will lie against him if the boughs of his tree are allowed to grow so as to overhang the adjoining land, which they had not been accustomed to do (*z*). In a case before Lord *Ellenborough*, at Nisi Prius (*a*), which was an action of trespass for nailing a board on the defendant's own wall, so as to overhang the plaintiff's garden, and where the maxim *Cujus est solum ejus est usque ad cœlum*, was cited in support of the form of action, his Lordship observed, that he did not think it was a *trespass* to interfere with the column of air superincumbent on the close; that, if it was, it would follow, that an aëronaut was liable to an action of trespass *qu. cl. fr.* at the suit of the occupier of every field over which his balloon might happen to pass; since the question, whether or not the action was maintainable, could not depend upon the length of time for which the superincumbent air was invaded: and the Lord Chief Justice further remarked, that, if any damage arose from the object which overhung the close, the remedy was by action on the case, and not by action of trespass (*b*).

It must be observed, moreover, that the maxim under consideration is not a presumption of law applicable in all cases and under all circumstances; for example, it does not apply to chambers in the inns of court (*c*); for "a man may have an inheritance in an upper chamber, though the lower buildings and soil be in another" (*d*).

sance" (G.); *per* Pollock, C.B., 4 H. & N. 600.

(*z*) *Norris* v. *Baker*, 1 Roll. Rep. 393, *ad fin.* See *Brook* v. *Jenney*, 2 Q. B. 265.

(*a*) *Pickering* v. *Rudd*, 4 Camp. 219; *per* Shadwell, V.-C. K., *Saunders* v. *Smith*, ed. by Crawford, 20; *Kenyon* v. *Hart*, 6 B. & S. 249, 252.

(*b*) See *Reynolds* v. *Clarke*, 2 Ld. Raym. 1399; *Fay* v. *Prentice*, 1 C. B. 828; *Corbett* v. *Hill*, L. R. 9 Eq. 671.

(*c*) *Per* Maule, J., 1 C. C. 840.

(*d*) Co. Litt. 48, b.

Land extends downwards as well as upwards.

Not only has land in its legal signification an indefinite extent upwards, but in contemplation of law it extends also downwards, so that whatever is in a direct line between the surface of any land and the centre of the earth belongs to the owner of the surface; and hence the word "land," which is *nomen generalissimum*, includes, not only the face of the earth, but everything under it or over it; and, therefore, if a man grants all his lands, he grants thereby all his mines, his woods, his waters, and houses, as well as his fields and meadows (*e*). Where, however, a demise was made of premises late in the occupation of A. (particularly described), part of which was a yard, it was held, that a cellar, situate under the yard, and late in the occupation of B., did not pass by the demise; for though *primâ facie* it would do so, yet that might be regulated and explained by circumstances (*f*).

The maxim, then, above cited, gives to the owner of the soil all that lies beneath its surface, and accordingly the land immediately below is his property. Whether, therefore, it be solid rock, or porous ground, or venous earth, or part soil and part water, the person who owns the surface may dig therein, and apply all that is there found to his own purposes, at his free will and pleasure (*g*); although, as already stated, he may in some cases incur liability by so digging and excavating at the extremity and under the surface of his own land as

(*e*) 2 Com. by Broom & Hadley, 15, 17.

(*f*) *Doe* d. *Freeland* v. *Burt*, 1 T. R. 701. See *Denison* v. *Holliday*, 1 H. & N. 631; and the maxim *Cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit, post.*

(*g*) Judgm., 12 M. & W. 324, 354.

to occasion damage to the house or other building of his neighbour (*h*).

Separate property in surface and minerals.

But, although the general rule, which obtains in the absence of any express covenant or agreement between the parties interested in land, is as above stated, and although it is a presumption of law that the owner of the freehold has a right to the mines and minerals underneath, yet this presumption may be rebutted by showing a distinct title to the surface, and to that which is beneath; for mines may form a distinct possession and different inheritance: and, indeed, it frequently happens that a person, being entitled both to the mines and to the land above, grants away the land, excepting out of the grant the mines, which would otherwise have passed under the conveyance of the land, and also reserving to himself the power of entering upon the surface of the land which he has granted away, in order to do such acts as may be necessary for the purpose of getting the minerals excepted out of the grant, a fair compensation being made to the grantee for so entering and working the mines. In this case one person has the land above, the other has the mines below, with the power of getting the minerals; and the rule is, according to the maxim *Sic utere tuo ut alienum non lædas*, already considered, that each shall so use his own right of property as not to injure his neighbour; and, therefore, the grantor will be entitled to such mines only as he can work, leaving a reasonable support to the surface. And here we may observe, that if a man *excepts* out of a grant all mines and minerals, he excepts also the right of doing all such things as are necessary for the purpose of obtaining the

(*h*) 1 Crabb, Real Prop., p. 93.

mines and minerals so excepted (*i*), as, for example, the right of going upon the land and making shafts and erecting engines (*k*).

If there be a grant of an upper room in a house with a reservation by the grantor of a lower room, he undertaking not to do anything which will derogate from the right to occupy the upper room; in this case, if the grantor were to remove the supports of the upper room, he would be liable in an action of covenant (*l*).

QUICQUID PLANTATUR SOLO SOLO CEDIT. (*Wentw. Off. Ex.*, 14*th ed.* 145.)—*Whatever is affixed to the soil belongs thereto.*

It may be stated, as a general rule of great antiquity, that, whatever is affixed (*m*) to the soil becomes, in contemplation of law, a part of it, and is consequently subjected to the same rights of property as the soil itself. In the Institutes of the Civil Law it is laid down, that if a man builds on his own land with the materials of another, the owner of the soil becomes, in law, the owner of the building also—*quia omne quod solo inædificatur solo cedit* (*n*). In this case, indeed, the property in the materials used still continued in the original owner; and although, by a law of the XII. Tables, the object of which was to prevent the destruction of buildings, he

(*i*) *Earl of Cardigan* v. *Armitage*, 2 Barn. & Cr. 197; *Clark* v. *Cogge*, Cro. Jac. 170.

(*k*) 2 Broom & Hadley's Com. 35.

(*l*) 5 M. & W. 71, 76.

(*m*) "In several of the old books the word *fixatur* is used as synonymous with *plantatur*" in the maxim *supra*, Judgm., L. R. 3 Ex. 260.

(*n*) I. 2. 1. 29; D. 47. 3. 1.

was unable, unless the building were taken down, to reclaim the materials *in specie*, he was, nevertheless, entitled to recover double their value as compensation by the action *de tigno juncto* (*o*). On the other hand, if a person built, with his own materials, on the land of another, the house likewise belonged to the owner of the soil; for in this case, the builder was presumed intentionally to have transferred his property in the materials to such owner (*p*). In like manner, if trees were planted or seed sown in the land of another, the proprietor of the soil became proprietor also of the tree, the plant, or the seed, as soon as it had taken root (*q*). And this latter proposition is fully adopted, almost in the words of the civil law, by our own law writers—Britton, Bracton, and Fleta (*r*). According to the Roman law, indeed, where buildings were erected upon, or improvements made to property, by the party in possession, *bonâ fide* and without notice of any adverse title, compensation was, it seems, allowed for such buildings and improvements to the party making them, as against the rightful owner (*s*); and although this principle is not recognised by our own common law, nor to its full extent by courts of equity, yet, where a man, supposing that he has an absolute title to an estate, builds upon the land with the knowledge of the rightful owner, who stands by, and suffers the erection to proceed, without giving any notice

(*o*) I. 2. 1. 29; D. 47. 3. 1.

(*p*) I. 2. 1. 30.

(*q*) I. 2. 1. 31 & 32; D. 41. 1. 7. 13.

(*r*) Britton (by Wingate), c. 33, 180; Bracton, c. 3, ss. 4, 6; Fleta, lib. 3, c. 2, s. 12.

(*s*) *Sed quamvis ædificium fundo cedat, fundi tamen dominus condemnari solet ut cum duntaxat recipiat, reddito sumptu quo pretiosior factus est, aut super fundo atque ædificio pensio imponatur ex meliorationis æstimatione si maluerit:* Gothofred. *ad* I. 2. 1. 30.

of his own claim, he will be compelled, by a court of equity, in a suit brought for recovery of the land, to make due allowance and compensation for such improvements (*t*). "As to the equity arising from valuable and lasting improvements, I do not consider," remarked Lord Chancellor Clare (*u*), "that a man who is conscious of a defect in his title, and with that conviction on his mind expends a sum of money in improvements, is entitled to avail himself of it. If the person really entitled to the estate will encourage the possessor of it to expend his money in improvements, or if he will look on and suffer such expenditure without apprising the party of his intention to dispute his title, and will afterwards endeavour to avail himself of such fraud—upon the ground of fraud the jurisdiction of a court of equity will clearly attach upon the case."

Having thus touched upon the general doctrine, that what has been affixed to the freehold becomes a portion of it, we shall proceed to consider in what manner, and with what qualifications, the maxim, *Quicquid plantatur solo solo cedit*, applies with reference to: 1st, trees; 2ndly, emblements; 3rdly, away-going crops; and, 4thly, fixtures;—treating these important subjects with brevity, and merely endeavouring to give a concise outline of the law respecting each.

Property in trees, &c.

1. The general property in trees, being *timber*, is in the owner of the inheritance of the land upon which

(*t*) 1 Story, Eq. Jurisp., 12th ed., s. 388; 2 *Id.*, s. 1237; *Ramsden* v. *Dyson*, L. R. 1 H. L. 129. Where a sale is set aside on account of the inadequacy of the consideration, the purchaser will be allowed for lasting and valuable improvements: Sugd., V. & P., 14th ed., 287.

(*u*) *Kenney* v. *Browne*, 3 Ridgw., Par. Cas., 462, 519; cited, Arg. *Austin* v. *Chambers*, 6 Cl. & Fin. 31. See, *per* Lord Brougham, C., *Perrott* v. *Palmer*, 3 My. & K. 640.

they grow; that in bushes and underwood, on the other hand, is in the tenant. The tenant cannot, indeed, without rendering himself liable to an action on the case for waste, do anything which will change the nature of the thing demised; he cannot, for instance stub up a wood, or destroy a park paling; neither can he destroy young plants destined to become trees, nor grub up or cut down and destroy fences; nor, in short, do any act prejudicial to the inheritance. He may, however, cut down trees which are not timber, either by general law, or by particular local custom; and he may likewise cut down such trees as are of seasonable wood, *i.e.*, such as are usually cut as underwood, and in due course grow up again from the stumps, and produce again their ordinary and usual profit by such growth (*x*).

The property in timber wrongfully cut down or blown down by a storm, if it is timber properly so called, belongs to the owner of the first vested estate of inheritance (*y*), unless he has colluded with the tenant for life to induce him to cut it down, in which case the court will interfere, and not allow him to get the benefit of his own wrong (*z*).

By the general law of England oak, ash, and elm are timber, provided they are of the age of twenty years or upwards, provided also they are not so old as not to have a reasonable quantity of usable wood in them, sufficient, according to a text writer, to make a good post (*a*).

Severance of trees not fit for timber.

Where trees not fit for timber are cut down by the

(*x*) *Lord D'Arcy* v. *Askwith*, Hob. 234; Judgm., *Phillipps* v. *Smith*, 14 M. & W. 589; *per* Tindal, C.J., *Berriman* v. *Peacock*, 9 Bing. 386, 387; Com. Dig., "*Biens*" (H.).

(*y*) *Bewick* v. *Whitfield*, 3 P. Wms. 268; *Honywood* v. *Honywood*, L. R. 18 Eq. 306.

(*z*) *Powlett* v. *Bolton*, 3 Ves. 377.

(*a*) *Honywood* v. *Honywood*, L. R. 18 Eq. 306; *per* Jessel, M. R. 319.

lessor, the property in such trees vests in the tenant; for the lessor would have no right to them if severed by the act of God, and, therefore, can have no right to them where they have been severed by a stranger (*b*).

Repairs.

A tenant, who is answerable for waste only, may cut down trees for the purpose of reparation, without committing waste, either where the damage has accrued, during the time of his being in possession, in the ordinary course of decay, or where the premises were ruinous at the time he entered; if, however, the decay happened by his default, in this case to cut down trees, in order to do the repair, would be waste (*c*); and, at all events, the tenant can only justify felling such trees as are fit for the purpose of repair (*d*). It is, moreover, a general rule, that waste can only be committed of the thing demised: and, therefore, if trees are excepted out of the demise, no waste can be committed of them (*e*).

Tenant without impeachment of waste.

A tenant "without impeachment of waste" is entitled to cut down timber, which he could not otherwise do; but this clause does not extend to allow destructive or malicious waste, such as cutting down timber which serves for the shelter or ornament of the estate (*f*). A tenant for life without impeachment of waste has as full power to cut down trees for his own use as if he had an estate of inheritance, and is equally entitled to the timber if severed by others, so that an action of trover for such timber will not lie against him at suit of a tenant in tail expectant on the termination of a life estate (*g*). But, if the tenant

(*b*) *Channon* v. *Patch*, 5 B. & C. 897, 902; *Ward* v. *Andrews*, 2 Chit. R. 636.

(*c*) Woodf., L. & T., 12th ed., 592.

(*d*) *Simmons* v. *Norton*, 7 Bing. 640.

(*e*) *Goodright* v. *Vivian*, 8 East, 190; *Rolls* v. *Rock*, cited, 2 Selw., N. P., 13th ed., 1244.

(*f*) *Packington's case*, 3 Atk. 215.

(*g*) *Pyne* v. *Dor*, 1 T. R. 55.

for life cut timber so as not to leave enough for repairs, or, if he cut down trees planted for ornament or shelter to the mansion-house, or saplings not fit to be felled for timber, he may be restrained by injunction (*h*). And where a tenant for life without impeachment of waste pulled down a mansion-house and rebuilt it in a more eligible situation, an act which was not complained of by the remainderman, an injunction was granted to restrain the tenant for life from destroying timber which had formed an ornament and shelter to the original mansion (*i*).

Tenant in tail.

Lastly, it is an inseparable incident to an estate tail, that the tenant shall not be punished for committing waste by felling timber; but this power must be exercised, if at all, during the life of the tenant in tail; for, at the instant of his death, it ceases. If, therefore, tenant in tail sells trees growing on the land, the vendee must cut them down during the life of the tenant in tail; for otherwise they will descend to the heir as part of the inheritance (*k*). Tenant in tail, after a possibility of issue extinct, is not liable for waste (*l*), though equity would, in this case, interfere to restrain extravagant and malicious devastation (*m*).

Emblements.

2. The next exception to the general rule, that whatever is planted or annexed to the soil or freehold passes with it, occurs in the case of emblements, which term comprises not only corn sown, but roots planted, and other

(*h*) Drewry on Injunct., 144.

(*i*) *Morris* v. *Morris*, 16 L. J., Chanc., 201. See *Duke of Leeds* v. *Earl Amherst*, *Id.* 5; S. C., 2 Phill. 117.

(*k*) Woodf., L. & T., 12th ed., 592.

(*l*) *Williams* v. *Williams*, 15 Ves. jun. 427; 2 Com. by Broom & Hadley, 244.

(*m*) 2 Bla. Com., 16th ed., 283, n. (10).

annual artificial profits of the land (*n*); and these, in certain cases, are distinct from the realty, and subject to many of the incidents attending personal property.

General rule.

The rule upon this subject at common law, and irrespectively of a recent statute hereinafter noticed (*o*), as already stated is, that those only are entitled to emblements who have an uncertain estate or interest in land, which is determined by the act of God, or of the law, between the period of sowing and the severance of the crop (*p*). Where, however, the tenancy is determined by the tenant's own act, as by forfeiture for waste committed, or by the marriage of a *feme* copyholder or a tenant *durante viduitate*, or in other similar cases, the tenant is not entitled to emblements; for the principle on which the law gives emblements is, that the tenant may be encouraged to cultivate by being sure of receiving the fruit of his labour, notwithstanding the determination of his estate by some unforeseen and unavoidable event (*q*). By this rule, however, the tenant is not entitled to *all* the fruits of his labour, or such right might be extended to things of a more permanent nature, such as trees, or to more crops than one, since the cultivator very often looks for a compensation for his capital and labour in the produce of successive years; but the principle is limited to this extent, that he is entitled to one crop of that species only which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period (*r*).

(*n*) Com. Dig., "*Biens*" (G. 1).
(*o*) *Post*, p. 385.
(*p*) Co. Litt. 55, *a*.
(*q*) Com. Dig., "*Biens*" (G. 2).
(*r*) Judgm., *Graves* v. *Weld*, 5 B. & Ad. 117, 118; citing *Kingsbury* v. *Collins*, 4 Bing. 202. In *Latham* v. *Atwood*, Cro. Car. 515, hops growing

If, then, a tenant for life, or *pur autre vie*, sows the land, and dies before harvest, his personal representatives shall have the emblements or profits of the crop; and if the tenant for life sows the land, and afterwards grants over his estate, and the grantee dies before the corn is severed, it shall go to the tenant for life, and not to the grantee's executor; and, if a man sows land, and lets it for life, and the lessee for life dies before the corn is severed, the reversioner, and not the lessee's executor, shall have the emblements, although, if the lessee had sown the land himself, it would have been otherwise (*s*). Tenant for life.

Further, the under-tenants or lessees of tenant for life will be entitled to emblements, in cases where tenant for life shall not have them, viz., where the life estate determines by the act of the last-mentioned party; as, in the case of a woman who holds *durante viduitate*, her taking a husband is her own act, and therefore deprives her of the emblements: but if she leases her estate to an under-tenant, who sows the land, and she then marries, this act shall not deprive the tenant of his emblements; for he is a stranger and could not prevent her (*t*). All these cases evidently involve the application of the general principle above stated.

So, the parochial clergy are tenants for their own lives, and the advantages of emblements are expressly given to them by stat. 28 Hen. 8, c. 11, s. 6, together with a power to enable the parson to dispose of the corn by will; but, if the estate is determined by the act of the party himself, as by resigning his living, according to the principle Parson.

from ancient roots were held to be *like* emblements, because they are "such things as grow by the manurance and industry of the owner."

(*s*) Arg. *Knevett* v. *Pool*, Cro. Eliz. 464; cited Woodf., L. & T., 12th ed., 723.

(*t*) Co. Litt. 55, b.

above stated, he will not be entitled to emblements. The lessee of the glebe of a parson who resigns is, however, in a different situation; for, his tenancy being determined by the act of another, he shall have the emblements (*u*).

Tenant for years and tenant from year to year.

A tenant for years, where the end of the term is certain, is not, it would seem, entitled to emblements (*x*), but a tenant from year to year, if the lessor determines the tenancy, seems to be entitled to emblements because he does not know in what year his lessor may determine the tenancy by half a year's notice to quit, and in that respect at least he has an uncertain estate (*y*). Where the tenancy for years depends upon an uncertainty, as upon the death of the lessor, who is tenant for life, or a husband seised in right of his wife; or if the term of years be determinable upon a life or lives in these and similar cases, the estate not being certainly to expire for a time foreknown, but merely by the act of God, the tenant, or his representatives, shall have the emblements in the same manner as a tenant for life would be entitled to them (*z*), and if the lessee of tenant for life be disseised, and the lessee of the disseisor sow, and then the tenant for life dies, and the remainderman enters, the latter shall not have the corn, but the lessee of the tenant for life (*a*).

Where, however, a tenant for years, or from year to year, himself puts an end to the tenancy, as if he does anything amounting to a forfeiture, the landlord shall have the emblements (*b*); and it is a general rule that he shall take them when he enters for a condition broken,

(*u*) *Bulwer* v. *Bulwer*, 2 B. & Ald. 470, 472; Woodf., L. & T., 12th ed., 724.

(*x*) Co. Lit. 56, a.

(*y*) *Kingsbury* v. *Collins*, 4 Bingh. 207; at p. 20.

(*z*) Woodf., L. & T., 12th ed., 723–24.

(*a*) *Knevett* v. *Pool*, Cro. Eliz. 463.

(*b*) Co. Litt. 55, b.

because he enters by title paramount, and is in as of his first estate (*c*). Where a lease was granted on condition, that, if the lessee contracted a debt on which he should be sued to judgment, followed by execution, the lessor should re-enter as of his former estate; it was held that the lessor, having accordingly re-entered after a judgment and execution, was entitled to the emblements (*d*).

Tenant at rack-rent.

Where a tenant of any farm or lands, holds the same at a rack-rent, it is now provided by stat. 14 & 15 Vict. c. 25, s. 1, that instead of claiming emblements he "shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit, upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate;" and the section further provides for an apportionment of the rent as between the tenant and the succeeding landlord or owner. The above Act applies to any tenancy in respect of which there is a substantial claim to emblements (*e*).

Heir, devisee, &c.

It has been mentioned that emblements are subject to many of the incidents attending personal property. Thus, by stat. 11 Geo. 2, c. 19, they may be distrained for rent (*f*), they are forfeitable by outlawry in a personal action, they were devisable by testament before the statute of wills, and at the death of the owner they vest

(*c*) *Per* Bosanquet, J., 7 Bing. 160; Com. Dig., "*Biens*" (G. 2); Co. Litt. 55, b.

(*d*) *Davis* v. *Eyton*, 7 Bing. 154.

(*e*) *Haines* v. *Welch*, L. R. 4 C. P. 91.

See, also, as to the operation of the above statute, *Lord Stradbroke* v. *Mulcahy*, 2 Ir. C. L. Rep. N. S., 406.

(*f*) See also stat. 56 Geo. 3, c. 50; *Hult* v. *Morrell*, 11 Q. B. 425.

in his executors and not in his heir (*g*). So, where tenant in fee or in tail dies after the corn has been sown, but before severance, it shall go to his personal representatives and not to the heir (*h*). If, however, tenant in fee sows land, and then devises the land by will and dies before severance, the devisee shall have the corn, and not the devisor's executors (*i*); and although it is not easy to account for this distinction, which gives corn growing to the devisee, but denies it to the heir (*k*), it is clear law that the growing crops pass to the devisee of the land unless they be expressly bequeathed by the will to some one else (*l*). The remainderman for life shall also have the emblements sown by the devisor in fee, in preference to the executor of the tenant for life (*m*); and the legatee of goods, stock, and movables, is entitled to growing corn in preference both to the devisee of the land and the executor (*n*).

Tenant at will.

In the case of strict tenancy at will, if the tenant sows his land, and the landlord, before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, since he could not possibly know when his landlord would determine his will, and therefore could make no provision against it; but it is otherwise when the tenant himself determines the will,

(*g*) 2 Com. by Broom & Hadley, 282.

(*h*) Com. Dig., "*Biens*," (G. 2); Co. Litt. 55, b., note (2), by Mr. Hargrave.

(*i*) *Anon.*, Cro. Eliz., 61; Co. Litt. 55, b., n. (2); *Spencer's case*, Winch. 51.

(*k*) See Co. Litt. 55, b., n. (2); Gilb. Ev. 250.

(*l*) *Cooper* v. *Woolfitt*, 2 H. & N. 122, 127; citing Shepp. Touch. (ed. by Preston), 472.

(*m*) Toll. Exors. 157.

(*n*) *Cox* v. *Godsalve*, 6 East, 604, note; *West* v. *Moore*, 8 East, 339.

for in this case the landlord shall have the profits of the land (*o*).

Tenant under execution.

Tenants under execution are entitled to emblements, when, by some sudden and casual profit, arising between seed-time and harvest, the tenancy is put an end to by the judgment being satisfied (*p*). Again, if A. acknowledge a statute or recognizance, and afterwards sow the land, and the conusee extend the land, the latter shall have the emblements (*q*); and where judgment was given against a person, and he then sowed the land and brought a writ of error to reverse the judgment, but it was affirmed, it was held, that the recoveror should have the corn (*r*).

Away-going crop.

3. An away-going crop may be defined to be the crop sown during the last year of tenancy, but not ripe until after its expiration. The right to this is usually vested in the out-going tenant, either by the express terms of the lease or contract, or by the usage or custom of the country; but, in the absence of any contract or custom, and provided the law of emblements does not apply, the landlord is entitled to crops unsevered at the determination of the tenancy, as being a portion of the realty, and by virtue of that general maxim the exceptions to which we are now considering.

The common law, it has been observed, does so little to prescribe the relative duties of landlord and tenant, that it is by no means surprising the Courts should have been favourably inclined to the introduction of those

(*o*) Litt. s. 68, with the commentary thereon; Co. Litt. 55.

(*p*) Woodf., L. & T., 12th ed., 724.

(*q*) 2 Leon. R. 54.

(*r*) *Wicks* v. *Jordan*, 2 Bulstr. 213.

regulations in the mode of cultivation which custom and usage have established in each district to be the most beneficial to all parties (*s*). The rule, therefore, is, that evidence of custom is receivable, although there be a written instrument of demise, provided the incident which it is sought to import by such evidence into the contract is consistent with the terms of such contract; but evidence of custom is inadmissible, if inconsistent with the express or implied terms of the instrument; and this rule applies to tenancies as well by parol agreement as by deed or written contract or demise (*t*).

Wigglesworth v. Dallison.

In *Wigglesworth* v. *Dallison* (*u*), which is a leading case on this subject, the tenant was allowed an away-going crop, although there was a formal lease under seal. There the lease was entirely silent on the subject of such a right; and Lord *Mansfield* said, that "the custom did not alter or contradict the lease, but only added something to it."

Hutton v. Warren.

In the case of *Hutton* v. *Warren* (*x*), it was held, that a custom, by which the tenant, cultivating according to the course of good husbandry, was entitled on quitting to receive from the landlord or incoming tenant a reasonable allowance for seeds and labour bestowed on the arable land in the last year of the tenancy, and was bound to leave the manure for the landlord, if he would purchase it,

(*s*) Judgm., *Hutton* v. *Warren*, 1 M. & W. 466.

(*t*) *Wigglesworth* v. *Dallison*, 1 Dougl. 201; *Faviell* v. *Gaskoin*, 7 Exch. 273; *Muncey* v. *Dennis*, 1 H. & N. 216; *Clarke* v. *Roystone*, 13 M. & W. 752.

(*u*) 1 Dougl. 201; affirmed in error, *Id.* 207, n. (8). See *Beavan* v. *Delahay*, 1 H. Bla. 5; recognised *Griffiths* v. *Puleston*, 13 M. & W. 358, 360; *Knight* v. *Bennett*, 3 Bing. 361; *White* v. *Sayer*, Palm. R. 211.

(*x*) 1 M. & W. 466. Proof of the custom lies on the out-going tenant: *Caldecott* v. *Smythies*, 7 C. & P. 808.

was not excluded by a stipulation in the lease to consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as should not be so spread on the land for the use of the landlord on receiving a reasonable price for it.

Tenant holding over.

Where a tenant continues to hold over after the expiration of his lease, without coming to any fresh agreement with his landlord, he must be taken to hold generally under the terms of the lease (*y*), on which, therefore, the admissibility of evidence of custom will depend (*z*).

Principle on which right depends.

The principle with respect to the right to take an away-going crop applies equally to the case of a tenancy from year to year as to a lease for a longer term (*a*); such custom, it has been observed, is just, for he who sows ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown when they knew their interest would expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly (*b*). It may be observed, too, that the question as to away-going crops

(*y*) See further as to this, *Hyatt* v. *Griffiths*, 17 Q. B. 505; *Thomas* v. *Packer*, 1 H. & N. 669.

(*z*) *Boraston* v. *Green*, 16 East, 71; *Roberts* v. *Barker*, 1 Cr. & M. 808; *Griffiths* v. *Puleston*, 13 M. & W. 358. See *Kimpton* v. *Eve*, 3 Ves. & B. 349.

(*a*) *Onslow* v. ——, 16 Ves. jun., 173. See *Thorpe* v. *Eyre*, 1 A. & E. 926, where the custom was held not to be available in the case of a tenancy which was determined by an award. *Ex parte Mandrell*, 2 Mad. 315.

(*b*) Judgm., *Wigglesworth* v. *Dallison*, 1 Dougl. 201; *Dalby* v. *Hirst*, 1 B. & B. 224.

under custom is quite a different matter from emblements, which are by the common law (*c*).

Fixtures:—Preliminary remarks.

4. The doctrine as to fixtures is peculiarly illustrative of the legal maxim under consideration; for the general rule, as laid down in the old books, is, that "whenever a tenant has affixed anything to the demised premises during his term, he can never again sever it without the consent of his landlord" (*d*). "The old rule" upon this subject, observes *Martin*, B. (*e*), "laid down in the old books is, that if the tenant or the occupier of a house or land annex anything to the freehold, neither he nor his representatives can afterwards take it away, the maxim being, *Quicquid plantatur solo, solo cedit.* But as society progressed, and tenants for lives or for terms of years of houses, for the more convenient or luxurious occupation of them, or for the purposes of trade, affixed valuable and expensive articles to the freehold, the injustice of denying the tenant the right to remove them at his pleasure, and deeming such things practically forfeited to the owner of the fee simple by the mere act of annexation, became apparent to all; and there long ago sprung up a right, sanctioned and supported both by the Courts of law and equity, in the temporary owner or occupier of real property, or his representative, to disannex and remove certain articles, though annexed by him to the freehold, and these articles have been denominated *fixtures.*"

Questions respecting the right to what are ordinarily

(*c*) *Per* Taunton, J., 1 A. & E. 133; citing Com. Dig. "*Biens*" (G. 2).

(*d*) Amos & Fer. on Fixtures, 2nd ed., 19.

(*e*) 10 Exch. 507, 508, citing *Minshall* v. *Lloyd*, 2 M. & W. 450. See also, *per* Wood, V.-C., *Mather* v. *Fraser*, 2 K. & J. 536.

called fixtures principally arise between three classes of persons; 1st, between heir and executor or administrator of tenant in fee; 2ndly, between the personal representatives of tenant for life or in tail and the remainderman or reversioner; 3rdly, between landlord and tenant. In the first of these cases, the general rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel anything which has been affixed thereto (*f*), in the second case, the right to fixtures is considered more favourably for the personal representatives than in the preceding; and, in the last case, the greatest latitude and indulgence have always been allowed in favour of the tenant (*g*);—so that decisions, establishing the right of the personal representatives to fixtures in the first and second of the above cases, will apply, *à fortiori*, to the third.

Meaning of term.

It is here necessary to remark, that the term "fixtures" is often used indiscriminately in reference to those articles which are not by law removable when once attached to the freehold, as well as to those which are severable therefrom (*h*). But, in its correct sense, to constitute an

(*f*) *Per* Lord Ellenborough, C.J., *Elwes* v. *Maw*, 3 East, 51; *per* Abbott, C.J., *Colegrave* v. *Dias Santos*, 2 B. & C. 78.

(*g*) *Per* Lord Ellenborough, C.J., *Elwes* v. *Maw*, *supra*; *per* Abbott, C. J., *Colegrave* v. *Dias Santos*, *supra*.

(*h*) *Per* Parke, B., *Minshall* v. *Lloyd*, 2 M. & W. 459; Judgm., L. R. 3 Ex. 260.

"There is no doubt that sometimes things annexed to land remain chattels as much after they have been annexed as they were before. The case of pictures hung on a wall for the purpose of being more conveniently seen, may be mentioned by way of illustration. On the other hand things may be made so completely a part of the land as being essential to its convenient use, that even a tenant could not remove them. An example of this class of chattel may be found in doors or windows. Lastly, things may be annexed to land for the pur-

article a fixture, *i.e.*, part of the realty, it must be actually annexed thereto, and *è converso* whatever is so annexed becomes part of the realty, and the person who was the owner of it when a chattel, loses his property in it, which immediately vests in the owner of the soil. This is the general rule, but there are cases in which things annexed to the freehold may be disannexed and carried away by some person claiming a property in them, as against the owner of the freehold (*i*).

With the above preliminary remarks we shall proceed very briefly to consider the three classes of cases specified at p. 391—*viz.*, between heir and the personal representatives of tenant in fee;—between the personal representatives of tenant for life or in tail and the remainderman or reversioner;—between landlord and tenant; noticing also under these heads the right to fixtures as between some other parties.

Between heir and executor.

In the class of cases arising between heir and executor, the rule has been thus stated: that whatever is strongly affixed to the freehold or inheritance, and cannot be severed thence without violence or damage, *quod ex ædibus non facile revellitur*, is become a member of the inheritance, and shall, therefore, pass to the heir (*j*); and, in the first place, it must be observed, that a chattel does not lose its personal nature unless fixed in or to the ground, or in or to some foundation which in itself forms

poses of trade, or of domestic convenience or ornament, in so permanent a manner as really to form a part of the land, and yet the tenant who has erected them is entitled to remove them during his term, or it may be within a reasonable time after its expiration." Judgm., L. R. 4 Ex. 329; *Longbottom* v. *Berry*, L. R. 5 Q. B. 123, 139; *per* Blackburn, J. *Reg.* v. *Lee*, L. R. 1 Q. B. 253.

(*i*) 2 Smith's Leading Cases, 8th ed., 192.

(*j*) See Shep. Touch. 469, 470; Com. Dig., "*Biens*" (B.).

part of the freehold. It is not sufficient that the article in question merely rests upon the soil, or upon such foundation (*k*); unless there be annexation, no difficulty can under any circumstances occur. It is frequently, however, a matter of doubt, whether the annexation can be considered as sufficient; and in such cases the best test appears to be whether the removal can be effected without substantial injury to the freehold (*l*).

Trade fixtures :— Remarks in *Elwes* v. *Maw*.

The strictness of the rule under consideration was, it may be remarked, very early relaxed, as between landlord and tenant, in favour of such fixtures as are partly or wholly essential to trade or manufacture (*m*); and the same relaxation has, in several modern cases, been extended to decisions of that class which we are now considering, *viz.*, those between heir and executor. In the case of *Elwes* v. *Maw*, which is justly regarded as a leading authority on the subject of fixtures, Lord *Ellenborough* observed (*n*), that, in determining whether a particular fixed instrument, machine, or even building, should be considered as removable by the executor as between him and the heir, the Court in the three principal cases (*o*) on the subject may be considered as

(*k*) *Willshear* v. *Cottrell*, 1 E. & B. 674; *Huntley* v. *Russell*, 13 Q. B. 572; *Hutchinson* v. *Kay*, 23 Beav. 413; *Mather* v. *Fraser*, 2 K. & J. 536; *R.* v. *Inhabs. of Otley*, 1 B. & Ad. 161, 165. See also *Wood* v. *Hewett*, 8 Q. B. 913; *Lancaster* v. *Eve*, 5 C. B. N. S. 717.

(*l*) *Avery* v. *Cheslyn*, 3 A. & B. 75; Judgm., *Martin* v. *Roe*, 7 E. & B. 44, where the right to remove ornamental fixtures as between the executors of an incumbent and his successor is considered.

(*m*) Judgm., 3 East, 51, 52; *per* Story, J., delivering the judgment in *Van Ness* v. *Pacard*, 2 Peters (U. S.), R. 143, 145.

(*n*) 3 East, 38.

(*o*) Viz., *Lowton* v. *Lowton*, 3 Atk. 13, which was the case of a fire engine to work a colliery erected by tenant for life; *Lord Dudley* v. *Lord Ward*, Amb. 113, which was also the case of a fire-engine; and *Lawton* v. *Salmon*, 1 H. Bla. 259, n.,

having decided mainly on this ground, that where the fixed instrument, engine, or utensil (and the building covering the same falls within the same principle), was an accessory to a matter of a personal nature, it should be itself considered as personalty. In two of these cases (*p*), a fire-engine was considered as an accessory to the carrying on the trade of getting and vending coals—a matter of a personal nature. In *Lord Dudley* v. *Lord Ward*, Lord *Hardwicke* says, "A colliery is not only an enjoyment of the estate, but in part carrying on a trade;" and in *Lawton* v. *Lawton* he says, "One reason that weighs with me is its being a mixed case, between enjoying the profits of the lands and carrying on a species of trade; and, considering it in this light, it comes very near the instances in brewhouses, &c., of furnaces and coppers." Upon the same principle Lord C. B. *Comyns* may be considered as having decided the case of the cyder-mill (*q*), *i.e.*, as a mixed case, between enjoying the profits of the land and carrying on a species of trade, and as considering the cyder-mill as properly an accessory to the trade of making cyder. In the case of the salt-pans (*r*), Lord *Mansfield* does not seem to have considered them as accessory to the carrying on a trade, but

which was trover for salt-pans brought by the executor against the tenant of the heir-at-law.

(*p*) *Lawton* v. *Lawton*, 3 Atk. 13; *Lord Dudley* v. *Lord Ward*, Amb. 113.

(*q*) Cited in *Lawton* v. *Lawton*, 3 Atk. 13; but see the observations respecting this case by Lord Hardwicke in *Lawton* v. *Salmon*, 1 H. Bla. 259, n.; *Lord Dudley* v. *Lord Ward*, Amb. 113; and in *Ex parte Quincey*, 3 Atk. 477, and Bull., N. P., 34. It seems that no rule of law can be extracted from a case of the particulars of which so little is known: see, *per* Lord Cottenham, *Fisher* v. *Dixon*, 12 Cl. & Fin. 329; and see as to the cyder-mill case, *per* Wood, V.-C., *Mather* v. *Fraser*, 2 K. & J. 536, reviewing the prior authorities.

(*r*) *Lawton* v. *Salmon*, 1 H. Bla. 259, n.

as merely the means of enjoying the benefit of the inheritance. Upon this principle he considered them as belonging to the heir as parcel of the inheritance, for the enjoyment of which they were made, and not as belonging to the executor as the means or instrument of carrying on a trade (*s*).

In a modern case before the House of Lords, it appeared that the absolute owner of land, for the purpose of better using and enjoying that land, had erected upon and affixed to the freehold certain machinery. It was held that, in the absence of any disposition by him of this machinery it would go to the heir as part of the real estate; and, further, that if the *corpus* of the machinery passed to the heir, all that belonged to such machinery, although more or less capable of being detached from it, and of being used in such detached state, must also be considered as belonging to the heir (*t*).

Devisee and executor.

As between devisee and executor the rule seems, in principle, to be the same as that already considered, the devisee standing in place of the heir as regards his right to fixtures; for, if a freehold house be devised, fixtures pass (*u*); but if tenant for life or in tail devise fixtures, his devise is void, he having no power to devise the realty

(*s*) *Per* Lord Ellenborough, C.J., 3 East, 54. See *Winn* v. *Ingilby*, 5 B. & Ald. 625; *R.* v. *St. Dunstan*, 4 B. & C. 686, 691; *Harvey* v. *Harvey*, Stra. 1141.

(*t*) *Fisher* v. *Dixon*, 12 Cl. & Fin. 312. In this case the exception in favour of trade was held not applicable; the judgments delivered contain, however, some remarks as to the limits of this exception, which are well worthy of consideration. See also *Mather* v. *Fraser*, 2 K. & J. 536, 545; Judgm., *Climie* v. *Wood*, L. R. 4 Ex. 330; Judgm., *Longbottom* v. *Berry*, L. R. 5 Q. B. 136, which latter cases also show that the decisions establishing a tenant's right to remove trade fixtures "do not apply as between mortgagor and mortgagee any more than between heir-at-law and executor."

(*u*) *Per* Best, J., *Colegrave* v. *Dias Santos*, 2 B. & C. 80.

to which they are incident. He may, however, devise such fixtures as would pass to his executor (*x*).

Devisee and heir.

As between the heir and devisee, it may be considered as a rule, that the latter will be entitled to all articles which are affixed to the land, whether the annexation in fact took place prior or subsequent to the date of the devise, according to the maxim, *Quod ædificatur in aredâ legatâ cedit legato;* and, therefore, by a devise of a house, all personal chattels which are annexed to the house, and which are essential to its enjoyment, will pass to the devisee (*y*).

Vendor and vendee.

As between vendor and vendee, everything which forms part of the freehold passes by a sale and conveyance of the freehold itself, if there be nothing to indicate a contrary intention (*z*).

Colegrave v. *Dias Santos.*

Thus, in *Colegrave* v. *Dias Santos* (*a*), the owner of a freehold house, in which there were various fixtures, sold it by auction. Nothing was said about the fixtures. A conveyance of the house was executed, and possession given to the purchaser, the fixtures still remaining in the house. It was held, that they passed by the conveyance of the freehold; and that, even if they did not, the vendor, after giving up possession, could not maintain trover for them.

Mortgagor and mortgagee.

The result of various recent decisions (*b*) is that the

(*x*) Shep. Touch. 469, 470; 4 Rep. 62.

(*y*) Amos & Fer., Fixtures, 2nd ed., 246.

(*z*) *Colegrave* v. *Dias Santos*, 2 B. & C. 76; cited, Arg. *Id.* 610; *per* Parke, B., *Hitchman* v. *Walton*, 4 M. & W. 416; *per* Patteson, J., *Harc* v. *Horton*, 5 B. & Ad. 730. See *Steward* v. *Lombe*, 1 B. & B. 506, 513; *Ryall* v. *Rolle*, 1 Atk. 175; *Thompson* v. *Pettitt*, 10 Q. B. 101; *Wiltshear* v. *Cottrell*, 1 E. & B. 674.

(*a*) 2 B. & C. 76. See *Manning* v. *Bailey*, 2 Exch. 45.

(*b*) Collected in *Climie* v. *Wood*, L. R. 3 Ex. 257, affirmed L. R. 4

old maxim *quicquid plantatur solo, solo cedit* applies in all its integrity to the relation of mortgagor and mortgagee, for a mortgage being a security or pledge for a debt, it is not unreasonable if a fixture be annexed to land at the time of a mortgage, or if the mortgagor in possession afterward annexes a fixture to it, that the fixture shall be deemed an additional security for the debt—whether it be a trade fixture or a fixture of any other kind; though upon the true construction of a mortgage deed trade fixtures may be removable by the mortgagor (*c*). It has accordingly been established that trade fixtures which have been annexed to the freehold for the more convenient using of them, and not to improve the inheritance, and which are capable of being removed without appreciable damage to the freehold, pass under a mortgage of the freehold to the mortgagee (*d*).

The effect of a mortgage then with regard to fixtures, is, in brief, similar to that of a conveyance (*e*); and trover will not lie against either vendee or mortgagee (*f*) in possession for chattels affixed to the freehold; but which

Ex. 328; 38 L. J. Ex. 223, with which *acc. Longbottom* v. *Berry*, L. R. 5 Q. B. 123; 39 L. J. Q. B. 37. See *Tebb* v. *Hodge*, L. R. 5 C. P. 73; 39 L. J. C. P. 56.

(*c*) Judgm., L. R. 3 Ex. 260.

(*d*) *Climie* v. *Wood*, *supra*; *Longbottom* v. *Berry*, *supra*; *Tebb* v. *Hodge*, *supra*; in which cases the prior decisions are collected. *Meux* v. *Jacobs*, L. R. 7 H. L. 481; 44 L. J. Ch. 481; *Holland* v. *Hodgson*, L. R. 7 C. P. 328; 41 L. J. C. P. 146.

(*e*) *Per* Parke, B., 4 M. & W. 416; *Longstaff* v. *Meagoe*, 2 A. & E. 167. See *Trappes* v. *Harter*, 2 Cr. & M, 153; cited *Hellawell* v. *Eastwood*, 6 Exch. 318; and in *Ex parte Barclay*, 5 De G. M. & G. 412; but said, *per* Cresswell, J., to have been overruled (*Wilde* v. *Waters*, 16 C. B. 647). *Trappes* v. *Harter*, has, however, frequently been recognised as an authority; *Mather* v. *Fraser*, 2 K. & J. 536. It was cited and distinguished in *Walmsley* v. *Milne*, 7 C. B. N. S. 133–4. See *Haley* v. *Hammersley*, 30 L. J., Chanc., 771; *Watson* v. *Lane*, 11 Exch. 769.

(*f*) 2 B. & C. 76; *Longstaff* v. *Meagoe*, 2 A. & E. 167. See *Boydell* v. *M'Michael*, 1 Cr. M. & R. 177; *Ex parte Bentley*, 2 M. D. & De G. 591.

might have been removed before possession was given under the deed. Where, however, there was a mortgage of dwelling-houses, foundries, and other premises, "together with all grates, &c., in and about the said two dwelling-houses, and the brewhouses thereto belonging," it was held that, although without these words the fixtures in the foundries would have passed, yet by them the fixtures intended to pass were confined to those in the dwelling-houses and brewhouses (*g*).

Valuation of fixtures.

In case of an absolute sale of premises, where the conveyance is not general, but contains a stipulation that "the fixtures are to be taken at a valuation," those things only should in strictness be valued which would be deemed personal assets as between heir and executor, and would not pass with the inheritance (*h*).

Ornamental fixtures.

It has been thought that ornamental fixtures form an exception to the general rule, and that fixtures which otherwise would pass to the heir or remainderman, do not, if they can be shown to be used for purposes of ornament merely, but as has been observed by the learned authors of Smith's Leading Cases, the authorities cited in support of this exception do not go far, for the articles given up to the executor in them seem to have been very slightly annexed to the freehold, and rather chattels than fixtures properly so-called. The case of *Beck* v. *Rebow* (*i*), which is the principal authority in favour of the exception, seems not to have been followed in the later decisions.

(*g*) *Hare* v. *Horton*, 5 B. & Ad. 726 (distinguished in *Mather* v. *Fraser*, cited *supra*, n. (*e*)); *Haley* v. *Hammersley*, and *Walmsley* v. *Milne*, *supra*; *Metropolitan Counties Assurance Co.* v. *Brown*, 26 Beav. 454.

(*h*) Amos & Fer., Fixtures, 2nd ed., 221.

(*i*) 1 P. Wms. 94, and see *Avery* v. *Cheslyn*, 3 Ad. & E. 75.

Executor and remainderman or reversioner —trade fixtures.

Secondly, as the heir is more favoured in law than the remainderman or reversioner, all cases in which an executor or administrator of the tenant in fee would be entitled to fixtures, as against the heir, will apply, *à fortiori*, to support the claim of the representatives of tenant for life, or in tail, against the remainderman or reversioner. The personal representatives, therefore, in the latter case, seem clearly entitled to fixtures erected for purposes of trade, as against the party in remainder or reversion (*k*).

Landlord and tenant

In the third class of cases above mentioned, that, *viz.*, between landlord and tenant, the general rule, that whatever has once been annexed to the freehold becomes a part of it, and cannot afterwards be removed, except by or with the consent of him who is entitled to the inheritance (*l*), must be qualified more largely than in the preceding classes: thus, the tenant may take away during the continuance of his term, or at the end of it, although not after he has quitted possession, such fixtures as he has himself put upon the demised premises, either for the purposes of trade, or for the ornament or furniture of his

(*k*) *Lawton* v. *Lawton*, 3 Atk. 13; *Lord Dudley* v. *Lord Ward*, Amb. 113.

(*l*) Co. Litt. 53, a; *per* Kindersley, V.-C., *Gibson* v. *Hammersmith R. C.*, 32 L. J., Chanc., 340 *et seq.* Trover does not lie for fixtures until after severance; *Dumergue* v. *Rumsey*, 2 H. & C. 777, 790; *Minshall* v. *Lloyd*, 2 M. & W. 450; recognised, *Mackintosh* v. *Trotter*, 3 *Id.* 184–186; *Roffey* v. *Henderson*, 17 Q. B. 574, 586; *London Loan, &c., Co.* v. *Drake*, 6 C. B. N. S. 798, 811. In *Wilde* v. *Waters*, 16 C. B. 651, Maule, J., delivering the judgment of the Court, observes, "Generally speaking, no doubt, fixtures are part of the freehold, and are not such goods and chattels as can be made the subject of an action of trover. But there are various exceptions to this rule, in respect of things which are set up for ornament or for the purpose of trade, or for other particular purposes. As to these, there are many distinctions, some of which are nice and intricate." See, also, *Clarke* v. *Holford*, 2 C. & K. 540.

house (*m*); but here a distinction must be observed between erections for the purposes of trade annexed to the freehold, and those which are for purposes merely agricultural (*n*). With respect to the former, the exception engrafted upon the general rule is of almost as high antiquity as the rule itself, being founded upon principles of public policy, and originating in a desire to encourage trade and manufactures. With respect to the latter class, however, it has been expressly decided that to such cases the general rule must be applied, unless it can be shown that the provisions of the statutes 14 & 15 Vict. c. 25, 38 & 39 Vict. c. 92, s. 53, or 46 & 47 Vict. c. 61, s. 34, apply, or that the object and purpose of the erections related partly to trade of any description, such as cyder-mills, machinery for working mines or collieries (*o*).

Elwes v. *Maw.*

In the leading case on this subject (*p*), it was held that

(*m*) Such as stoves, grates, ornamental chimney-pieces, wainscots fastened with screws, coppers, a pump very slightly affixed to the freehold, and various other articles; *per* Erle, J., and Crowder, J., *Bishop* v. *Elliott*, 11 Exch. 115; *Grymes* v. *Boweren*, 6 Bing. 437; and *per* Tindal, C.J., *Id.* 439, 440; *Horn* v. *Baker*, 9 East, 215, 238. In *Buckland* v. *Butterfield*, 2 B. & B. 54, which is another important decision on this subject, it was held, that a conservatory erected on a brick foundation, attached to a dwelling-house, and communicating with it by windows, and by a flue passing into the parlour-chimney, becomes part of the freehold, and cannot be removed by the tenant or his assignees. See *West* v. *Blakeway*, 2 M. & Gr. 729; *Burt* v. *Haslett*, 18 C. B. 162; S. C., *Id.* 893.

See also *Powell*, app., *Farmer*, resp., 18 C. B. N. S. 168, 178; *Powell*, app., *Boraston*, resp., *Id.*, 175.

(*n*) *Per* Lord Kenyon, C. J., *Penton* v. *Robart*, 2 East, 90; Judgm., *Earl of Mansfield* v. *Blackburne*, 3 Bing., N. C., 438. A nurseryman may, at the end of his term, remove trees planted for the purpose of sale; Amos & Fer., Fixtures, 2nd ed., 68.

(*o*) Woodfall, L. & T., 12th ed., 607.

(*p*) *Elwes* v. *Maw*, 3 East, 38. See *Smith* v. *Render*, 27 L. J., Ex., 83; and cases there cited.

a tenant in agriculture, who erected at his own expense, and for the necessary and convenient occupation of his farm, a beast-house, and carpenter's shop, &c., which buildings were of brick and mortar, and tiled, and let into the ground, could not legally remove the same even during his term, although by so doing he would leave the premises in the same state as when he entered; and a distinction was here taken between annexations to the freehold for the purposes of trade, and those made for the purposes of agriculture and for better enjoying the immediate profits of the land. Where, indeed, a superincumbent shed is erected as a mere accessory to a personal chattel, as an engine, it may, as coming within the definition of a trade fixture, be removed; but where it is accessory to the realty it can in no case be removed (*q*).

It has been stated, that the right of removal, where it exists, should be exercised during the continuance of the term, or during a certain time after its expiration during which the tenant has a right to consider himself as still in possession of the premises as tenant under the landlord (*r*). In a recent case, the lessee of business premises having become bankrupt, the trustee sold the fixtures upon the terms that they were to be removed within two days after the sale, which was not done, as the buyer was negotiating with the landlord of the premises for their purchase. The negotiations having fallen through the trustee surrendered the lease to the landlord, who relet the premises with the fixtures on them. About a fortnight afterwards the buyer, hearing of the surrender, applied for the fixtures, and it was held he was entitled

(*q*) *Whitehead* v. *Bennett*, 27 L. J., Ch., 474.

(*r*) *Ex parte Stephens, re Lewis*, 7 Ch. Div. 127; 47 L. J., Bk., 22.

to them, as he had not lost his right by delay or laches (*s*). This case would seem to engraft an equitable exception upon the common law rule that the fixtures must be removed during such time as the tenant has a right to consider himself in possession. It is also important to remark, that the legal right of the tenant to remove fixtures is capable of being either extended or controlled by the express agreement of the parties; and the ordinary right of the tenant to disannex tenants' fixtures during the term may thus be renounced by him (*t*); it is, in fact, very usual to introduce into a lease a covenant for this purpose, either specifying what fixtures shall be removable by the tenant, or stipulating that he will, at the end of the term, deliver up all fixtures annexed during its continuance to the landlord's use (*u*). Where a lessee mortgaged tenant's fixtures, and afterwards surrendered his lease to the lessor, who granted a fresh lease to a third party, the mortgagees were held entitled to enter and sever the fixtures (*x*).

It is also worthy of notice, that the right of property in fixtures may be modified by proof of a special usage prevailing in the particular neighbourhood (*y*); and it may, also, as in the case of landlord and tenant, be modified by evidence of the intention of the parties; *ex. gr.*, a chattel

(*s*) *Saint* v. *Pilley*, L. R. 10 Ex. 137; 44 L. J. Ex. 137; and see also *London Loan, &c., Co.* v. *Drake*, 6 C. B. N. S. 798.

(*t*) *Dumergue* v. *Rumsey*, 2 H. & C. 777.

(*u*) See *Bishop* v. *Elliott*, 11 Exch. 113; *Stansfeld* v. *Mayor, &c., of Portsmouth*, 4 C. B. N. S. 120; *Earl of Mansfield* v. *Blackburne*, 3 Bing., N. C., 438; *Foley* v. *Addenbrooke*, 13 M. & W. 174; *Sleddon* v. *Cruikshank*, 16 M. & W. 71; *Heap* v. *Barton*, 12 C. B. 274, citing *Penton* v. *Robart*, 2 East, 88.

(*x*) *London Loan, &c., Co.* v. *Drake*, 6 C. B. N. S. 798.

(*y*) Vin. Abr., "*Executors*," U. 74. See *Davis* v. *Jones*, 2 B. & Ald. 165, 168.

placed by the owner upon the freehold of another, but severable from it without injury thereto, does not necessarily become part of the freehold, it is matter of evidence whether by agreement it does not remain the property of the original owner (z).

Wake v *Hall.* Mining fixtures.

In *Wake* v. *Hall* (a) the important question of the right of a mine owner against the surface owner to the various buildings erected by the former on the surface for the purpose of winning the minerals was raised and discussed. In that case the question was between certain surface owners of lands situate in Derbyshire, within the limits of the High Peak Mining Customs and Minerals Courts Acts, 1851, and certain miners who derived their title to the mines under the customs set out in the Act. The Lord Chancellor, in delivering judgment, treated the case, however, as one between an owner in fee simple of mines, reserved and excepted by a deed granting land subject to such exception and reservation, and the grantee of the surface. From this case it appears that the mine owner has the right to remove all buildings and other erections erected by him on the surface for the purpose of mining operations, after he has ceased to work

(z) *Wood* v. *Hewett*, 8 Q. B. 913, followed in *Lancaster* v. *Eve*, 5 C. B. N. S. 717, 722, 727, 728, where Williams, J., observes, "No doubt the maxim *Quicquid plantatur solo, solo cedit* is well established; the only question is, what is meant by it? It is clear that the mere putting a chattel into the soil by another cannot alter the ownership of the chattel. To apply the maxim, there must be such a fixing to the soil as reasonably to lead to the inference that it was intended to be incorporated with the soil."

In connection with what has been said *supra*, respecting the right to fixtures as between landlord and tenant, may be consulted the cases cited *ante*, which concern mortgagor and mortgagee.

(a) 7 Q. B. D. 295; 50 L. J., Q. B., 545.

the minerals, provided the removal takes place within a reasonable time after such cessation.

Concluding remarks.

In concluding these remarks concerning fixtures, we may observe that the uncertainty of the law on this subject results necessarily from the fact that each case involving a question as to the right to fixtures is professedly and necessarily, in a great measure, decided according to its own particular circumstances; and a perusal of the preceding pages will sufficiently show that the maxim *Quicquid plantatur solo, solo cedit* is held up by our law only to be departed from on account of the acknowledged ill effects which would ensue from too strict an application of it.

DOMUS SUA CUIQUE EST TUTISSIMUM REFUGIUM. (5 *Rep.* 92.)—*Every man's house is his castle* (*b*).

Seymayne's case.

In a leading case which well exemplifies the application of the above maxim, the facts may be shortly stated thus:—The defendant and one B. were joint tenants of a house in London. B. acknowledged a recognisance in the nature of a statute staple to the plaintiff, and, being possessed of certain goods in the said house, died, whereupon the house in which the goods remained became vested in the defendant by survivorship. Plaintiff sued out process of extent on the statute to the sheriffs of London; and, on the sheriffs having returned the conusor dead, he had another writ to extend all the lands which B. had at the time of acknowledging the statute, or at any time after, and all the goods which he had at the day

(*b*) *Nemo de domo suâ extrahi debet*, D. 50. 17. 103.

of his death. This writ plaintiff delivered to the sheriffs, and told them that divers goods belonging to B. at the time of his death were in the defendant's house; upon which the sheriffs charged the jury to make inquiry according to the said writ, and the sheriffs and jury came to the house aforesaid, and offered to enter in order to extend the goods, the outer door of the house being then open; whereupon the defendant, *præmissorum non ignarus*, and intending to disturb the execution, shut the door against the sheriffs and jury, whereby the plaintiff lost the benefit of his writ (*c*).

In the above case, the following points, which bear upon the present subject, were resolved, and may be thus shortly stated.

First resolution.

1st. That the house of every one is his castle, as well for his defence against injury and violence, as for his repose; and, consequently, although the life of man is a thing precious and favoured in law, yet if thieves come to a man's house to rob or murder him, and the owner or his servants kill any of the thieves in defence of himself and his house, this is not felony. So, if any person attempt to burn or burglariously (*d*) to break and enter any dwelling-house in the night-time, or attempt to break open a house in the day-time, with intent to rob, and be killed in the attempt, the slayer shall be acquitted and discharged, for the homicide is justifiable (*e*). And in

(*c*) *Seymayne's case*, 5 Rep. 91; cited *per* Tindal, C.J., *Hollier* v. *Laurie*, 3 C. B. 339.

(*d*) In determining what is a *burglarious* entry of a dwelling-house, our law has, *in favorem vitæ*, resorted to many refinements and much nicety of construction. See, *per* Coltman, J., 6 C. B. 10.

(*e*) 1 Hale, P. C., 481, 488. By stat. 24 & 25 Vict. c. 100, s. 7, no punishment or forfeiture shall be incurred by any person who shall kill another in his own defence.

such cases, not only the owner whose person or property is thus attacked, but his servants and the members of his family, or even strangers who are present at the time, are equally justified in killing the assailant (*f*).

In order, however, that a case may fall within the preceding rule, the intent to commit such a forcible and atrocious crime as above mentioned must be clearly manifested by the felon; otherwise, the homicide will amount to manslaughter, at least, if not to murder (*g*).

Second resolution.

2ndly. It was resolved in the principal case, that when any house is recovered by ejectment, the sheriff may break the house, in order to deliver seisin and possession thereof to the lessor of the plaintiff. The officer may, if necessary, break open doors, in order to execute a writ of *habere facias possessionem*, if the possession be not quietly given up; or he may take the *posse comitatus* with him, if he fear violence (*h*); and he may remove all persons, goods, &c., from off the premises before he gives possession (*i*). After verdict and judgment in ejectment, it was in practice usual for the lessor of the plaintiff to point out to the sheriff the premises recovered, and then the sheriff gave the lessor, at his own peril, execution of what he demanded (*k*). By the County Court Acts (*l*) a summary mode of obtaining possession of small tenements is provided.

Third resolution.

3rdly. The third exception to the general rule is, where

(*f*) 1 Hale, P. C., 481, 484, *et seq.*

(*g*) 1 Hale, P. C., 484; *R.* v. *Scully*, 1 C. & P. 319.

(*h*) 5 Rep. 91.

(*i*) *Upton* v. *Wells*, 1 Leon R. 145.

(*k*) Ad. Eject., 4th ed., 300, 301. See, *per* Patteson, J., *Doe* d. *Stevens* v. *Lord*, 6 Dowl. 256, 266.

(*l*) As to recovering possession of a tenement in the County Court, see Broom's C. C. Pr., 2nd ed., 288, 292.

the execution is at suit of the Crown, as where a felony or misdemeanor has been committed, in which case the sheriff may break open the outer door of the defendant's dwelling-house, having first signified the cause of his coming and desired admission (*m*).

But bare suspicion touching the guilt of the party will not warrant the proceeding to this extremity, though a felony has been actually committed, unless the officer comes armed with a warrant from a magistrate grounded on such suspicion (*n*). And a plea justifying the breaking and entering a man's house without warrant on suspicion of felony, ought distinctly to show, not only that there was reason to believe that the suspected person was there, but also that the defendant entered for the purpose of apprehending him (*o*).

Fourth resolution.

4thly. In all cases where the outer door of a house is open the sheriff may enter and do execution, either of the body or goods of the occupier, at the suit of any subject of the Crown, and the landlord may, in such case, likewise, enter to distrain for rent, or may even open the outer door in the ordinary manner—as by lifting the latch—to levy the distress (*p*), or he may, it has been held, for that purpose enter through an open window (*q*). But

(*m*) *Seymayne's* case, 3rd resolution; Finch, Law, 39. See, also, *Sherwin* v. *Swindall*, 12 M. & W. 783; *Launock* v. *Brown*, 2 B. & Ald. 592, which was a case of arrest for a misdemeanor; *Burdett* v. *Abbot*, 14 East, 157, 158, where the plaintiff was arrested under the Speaker's warrant for a breach of privilege; Foster on Homicide, 320. As to the power of arrest under the warrant of a Secretary of State, see *R.* v. *Wilkes*, 2 Wils. 151; *Entick* v. *Carrington*, *Id.* 275; S. C., 19 Howell, St. Tr. 1030.

(*n*) Foster on Homicide, 320.

(*o*) *Smith* v. *Shirley*, 3 C. B. 142.

(*p*) *Ryan* v. *Shilcock*, 7 Exch. 72.

(*q*) *Nixon* v. *Freeman*, 5 H. & N. 652, as to which see *per* Cockburn, C.J., L. R. 2 Q. B. 592. *Secus* if the window be fastened by a hasp, *Hancock* v. *Austin*, 14 C. B. N. S.

the sheriff cannot, in order to execute a writ of *ca. sa.* or *fi. fa.* at suit of a private person, break open the outer door of a man's house, even after request made, and refusal to open it (*r*). "Nothing is more certain than that in the ordinary cases of the execution of civil process between subject and subject, no person is warranted in breaking open the outer door in order to execute such process; the law values the private repose and security of every man in his own house, which it considers as his castle, beyond the civil satisfaction of a creditor" (*s*). Nor can the outer door of a house be broken open, nor an entry be made through a window which is shut but not fastened (*t*), in order to make a distress, except in the case of goods fraudulently removed (*u*); neither can a landlord break open the outer door of a stable, though not within the curtilage, to levy an ordinary distress for rent (*x*).

634; *Attack* v. *Bramwell*, 3 B. & S. 520.

"The ground of holding entry through a closed but unfastened door to be lawful is that access through the door is the usual mode of access, and that the licence from the occupier to any one to enter who has lawful business, may therefore be implied from his leaving the door unfastened. Entry through a window is not the usual mode of entry, and, therefore, no such licence can be implied from the window being left unfastened:" *per* Lush, J., L. R. 2 Q. B. 593.

(*r*) *Duke of Brunswick* v. *Slowman*, 8 C. B. 317; *Curlewis* v. *Laurie*, 12 Q. B. 640. See *Percival* v. *Stamp*, 9 Exch. 167.

Where the sheriff's officer put his hand into the debtor's dwelling-house and touched the debtor, who was inside the house, saying "you are my prisoner," and thereupon broke open the outer door and seized the debtor, the arrest was held to have been legally effected; *Sandon* v. *Jervis*, E. B. & E. 935; discussed and explained in *Nash* v. *Lucas*, L. R. 2 Q. B. 590, 594.

(*s*) *Per* Lord Ellenborough, C.J., *Burdett* v. *Abbot*, 14 East, 154.

(*t*) *Nash* v. *Lucas*, L. R. 2 Q. B. 590.

(*u*) *Williams* v. *Roberts*, 7 Exch. 618. See *Thomas* v. *Watkins*, *Id.* 630.

(*x*) *Brown* v. *Glenn*, 16 Q. B. 254.

Where, however, the sheriff has obtained admission to a house, he may justify subsequently breaking open inner doors, if he finds that necessary, in order to execute his process (*y*). Where A. therefore, let a house, except one room, which he reserved for himself and occupied separately, and, the outer door of the house being open, a constable broke open the door of the inner room occupied by A. in order to arrest him; it was held that trespass would not lie against the constable (*z*). So, where it appeared that the front door of the house was in general kept fastened, the usual entrance being through the back door, and that the sheriff, having entered by the back door while it was open in the night, broke open the door of an inner room in which A. B. was with his family, and there arrested him; the arrest was held to have been lawful (*a*). In an action of trespass against a sheriff for breaking and spoiling a lock, bolt, and staple, affixed to the outer door of plaintiff's dwelling-house, the defendant pleaded that, being lawfully in a room of the dwelling-house occupied by D., as tenant to the plaintiff, he peaceably entered into the residue of the said house through the door communicating between the room and the residue, and took plaintiff's goods in execution under a *fi. fa.*; and because the outer door was shut and fastened with the lock, bolt, and staple, so that defendant could not otherwise take away the goods, and because neither plaintiff nor any other on his behalf was in the dwelling-house to whom request could be made (*b*),

Pugh v. *Griffith.*

(*y*) *Lee* v. *Gansel*, Cowp. 1; *Ratcliffe* v. *Burton*, 3 B. & P. 223; *Browning* v. *Dann*, Cas. temp. Hardw. 167. See *Woods* v. *Durrant*, 16 M. & W. 149; *Hutchinson* v. *Birch*, 4 Taunt. 619.

(*z*) *Williams* v. *Spence*, 5 Johns. (U. S.) R. 352.

(*a*) *Hubbard* v. *Mace*, 17 Johns. (U. S.) R. 127.

(*b*) See *Ratcliffe* v. *Burton*, 3 B. & P. 223.

defendant did, for the purpose aforesaid, open the outer door and, in so doing, did break and spoil the lock, and doing no unnecessary damage (*c*). The Court held that the plea was good, although it was not shown how the defendant entered into the house, nor who fastened the outer door; they also thought it sufficiently appeared that there was no other way of getting out than that adopted; and that, in the absence of the plaintiff, the sheriff was excused from making a demand, and was justified in breaking the lock, &c., as matter of necessity, in order to get the goods out to execute the writ. In the previous case of *White* v. *Wiltshire* (*d*), it had been held that, though the sheriff cannot break open a house in order to make execution under a *fi. fa.*, yet, if the door is open, and the bailiffs enter and are disturbed in their execution by the parties who are within the house, he may break into the house and rescue his bailiffs, and so take execution. In this case, as observed by the Court in *Pugh* v. *Griffith*, above cited, the breaking into the house was justified, because the plaintiff himself had occasioned the necessity of it; but it does not follow that there may not be other occasions where the outer door may be broken (*e*).

The privilege which, by the fourth resolution in *Seymayne's case*, was held to attach to a man's house, must, however, be strictly confined thereto, and does not extend to barns or outhouses unconnected with the dwelling-house (*f*). It admits also of this exception, that if the defendant escape from arrest, the sheriff may,

(*c*) *Pugh* v. *Griffith*, 7 A. & E. 827.

(*d*) Palm. R. 52; Cro. Jac. 555.

(*e*) Judgm., 7 A. & E. 840.

(*f*) *Penton* v. *Browne*, 1 Sid. 186; distinguished in *Brown* v. *Glenn*, 16 Q. B. 254, 257.

after demand of admission and refusal, break open either his own house or that of a stranger for the purpose of retaking him (*g*). Moreover, if the sheriff breaks open an outer door when he is not justified in doing so, this, it would seem, does not vitiate the execution, but merely renders the sheriff liable to an action of trespass (*h*). A sheriff's officer, in execution of a bailable writ, peaceably obtained entrance by the outer door; but before he could make an actual arrest, was forcibly expelled from the house, and the outer door fastened against him. The officer thereupon, having obtained assistance, broke open the outer door, and made the arrest; and it was held that he was justified in so doing; for, the outer door being open in the first instance, the officer was entitled to enter the house under civil process, and, being lawfully in the house, the prosecutor was guilty of a trespass in expelling him; and that, the act of locking the outer door being unlawful, the prosecutor could confer no privilege upon himself by that unlawful act. In the above case it was further held, that a demand of re-entry by the officer was not, under the circumstances, requisite to justify him in breaking open the outer door; for "the law, in its wisdom, only requires this ceremony to be observed when it possibly may be attended with some advantage, and may render the breaking open of the outer door unnecessary" (*i*).

5thly. It was resolved that a man's house is not a castle for any one but himself, and shall not afford protection to

Fifth resolution.

(*g*) *Anon.*, 6 Mod. 105; *Lloyd* v. *Sandilands*, 8 Taunt. 250. See *Gemmer* v. *Sparkes*, 1 Salk. 79.

(*h*) See 4th resolution, in *Seymayne's case, ad finem*; 2 Bac. Abr., "*Execution*" (N.); *Percival* v. *Stamp*, 9 Exch. 167.

(*i*) *Aga Kurboolie Mahomed* v. *The Queen*, 4 Moore, P. C. Cas., 239.

a third party who flies thither, or to his goods, if brought or conveyed into the house to prevent a lawful execution, and to escape the ordinary process of law. In these latter cases, therefore, the sheriff may, after request and denial, break open the door, or he may enter if the door be open (*k*). It must be observed, however, that the sheriff does so at his peril; and if it turn out that the defendant was not in the house, or had no property there, he is a trespasser (*l*).

The distinction being now clearly established, that, if a sheriff enters the house of the defendant himself for the purpose of arresting him or taking his goods, he is justified, provided he has reasonable grounds for believing that the party is there or his goods; but if he enters the house of a stranger with the like object in view, he can be justified only by the event (*m*). It has been suggested, however, that circumstances might exist under which the sheriff would be justified in entering the house of a stranger on suspicion although the defendant was not there; as, for instance, that the defendant were on a visit with a stranger, the dwelling-house of the stranger might be *pro tempore* the defendant's dwelling-house (*n*); but there seems no modern decision in support of this proposition.

Forcible entry.

It may not be inappropriate to add, in connection with the maxim under consideration, that, although, as a general rule, where a house has been unlawfully erected on a common, a commoner, whose enjoyment of the common

(*k*) *Seymayne's case, supra; per* Tindal, C.J., *Cook* v. *Clark*, 10 Bing. 21; Com. Dig., "*Execution*" (C. 5); *Penton* v. *Browne*, 1 Sid. 186.

(*l*) *Johnson* v. *Leigh*, 6 Taunt. 246; *Morrish* v. *Murray*, *infra*; Com. Dig., "*Execution*" (C. 5).

(*m*) *Morrish* v. *Murray*, 13 M. & W. 52, 57; *Cooke* v. *Birt*, 5 Taunt. 765.

(*n*) Smith's L. C., 8th ed., vol. i., 123.

has been thus interrupted, may pull it down; he is, nevertheless, not justified in doing so *without previous notice or request* (*o*), if there are persons actually in it at the time (*p*). But, as remarked by Lord *Campbell*, C.J. (*q*), it would be giving a most dangerous extension to the doctrine thus laid down "to hold that the owner of a house could not exercise the right of pulling it down because a trespasser was in it." And, notwithstanding some conflict among judicial dicta upon the subject (*r*), it seems that in trespass "it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner and that he entered upon it accordingly, even though in so doing a breach of the peace was committed" (*s*). The learned judge, whose words have been just quoted, further intimates an opinion (*t*) that "where a breach of the peace is committed by a freeholder who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry (*u*), he is not liable

(*o*) *Davies* v. *Williams*, 16 Q. B. 546, 556.

(*p*) *Perry* v. *Fitzhowe*, 8 Q. B. 757; *Jones* v. *Jones*, 1 H. & C. 1.

(*q*) *Burling* v. *Read*, 11 Q. B. 904, 908; *Davison* v. *Wilson*, *Id.* 890.

(*r*) See *Newton* v. *Harland*, 1 M. & Gr. 644; *Pollen* v. *Brewer*, 7 C. B. N. S. 371; *per* Cresswell, J., *Davis* v. *Burrell*, 10 C. B. 825; *per* Parke, B., and Alderson, B., 14 M. & W. 437. In *Delaney* v. *Fox*, 1 C. B. N. S. 166, the point above mentioned was also raised. See *Butcher* v. *Butcher*, 7 B. & C. 399.

(*s*) *Per* Parke, B., *Harvey* v. *Brydges*, 14 M. & W. 442; S. C., 1 Exch. 261; recognised and followed in *Blades* v. *Higgs*, 10 C. B. N. S. 713; 30 L. J. C. P. 347; see *Meriton* v. *Coombes*, 9 C. B. 789.

(*t*) 14 M. & W. 442; cited judgm., *Blades* v. *Higgs*, 10 C. B. N. S. 721; S. C., 11 H. L. Cas. 621 (where the principle laid down *supra* was applied to the retaking of chattels); *Pollen* v. *Brewer*, 7 C. B. N. S. 371.

(*u*) See, *per* Lord Kenyon, C.J., *Taunton* v. *Costar*, 7 T. R. 432.

to the other party." And it may, in concluding these remarks be observed that although, an action of trespass will not lie against one who, having the right to the possession of the freehold, forcibly ejects the occupier, yet he may render himself liable to be indicted for a forcible entry under the statute 5 Ric. 2, ch. 7, if it be shown that violence or threats of violence (*x*) were used to obtain possession.

§ III.—THE TRANSFER OF PROPERTY.

The two leading maxims relative to the transfer of property are, first, that alienation is favoured by the law; and, secondly, that an assignee holds property subject to the same rights and liabilities as attached to it whilst in the possession of the grantor. Besides the above very general principles, we have included in this section several minor maxims of much practical importance, connected with the same subject; and each of these, according to the plan pursued throughout this Work, has been briefly illustrated by decided cases.

ALIENATIO REI PRÆFERTUR JURI ACCRESCENDI. (*Co. Litt.* 185. *a.*)—*Alienation is favoured by the law rather than accumulation.*

Alienatio is defined to be, *omnis actus per quem dominium transfertur* (*y*), and it is the well-known

(*x*) *Milner* v. *Maclean*, 2 C. & P. 17.

(*y*) Brisson. ad verb. "*Alienatio.*"

policy of our law to favour alienation, and to discountenance every attempt to tie up property unreasonably, or in other words, to create a perpetuity.

Feudal system was opposed to alienation.

The reader will at once remark, that the feudal policy was directly opposed to those more wise and liberal views which have now long prevailed. It is, indeed, generally admitted (*z*), that, under the Saxon sway, the power of alienating real property was altogether unrestricted; and that land first ceased to be alienable when the feudal system was introduced into this country, shortly after the Norman conquest; for, although the Conqueror's right to the Crown of England seems to have been founded on title, and not on conquest, yet, according to the fundamental principle of that system, all land within the king's territories was held to be derived, either mediately or immediately, from him as the supreme lord, and was subjected to those burthens and restrictions which were incident to the feudal tenure. Now this tenure originated in the mutual contract between lord and vassal, whereby the latter, in consideration of the feud with which he was invested, bound himself to render certain services to the former, and as the feudatory could not, without the consent of his lord, substitute the services of another for his own (*a*), so neither could the lord, without the feudatory's consent, transfer his fealty and allegiance to another (*b*). It is, however, necessary to bear in mind the distinction which was recognised by the feudal laws between alienation and subinfeudation; for, although alienation, meaning thereby the transfer of the

(*z*) Wright, Tenures, 154 *et seq.*

(*a*) See *Bradshaw* v. *Lawson*, 4 T. R. 443.

(*b*) Wright, Tenures, 171; Mr. Butler's note, Co. Litt, 309, a. (1).

original feud, and substitution of a new for the old feudatory was strictly prohibited, yet subinfeudation, whereby a new and inferior feud was carved out of that originally created, was practised and permitted. Moreover, as feudatories did, in fact, under colour of subinfeudation, frequently dispose of their lands, this practice, which was in its tendency opposed to the spirit of the feudal institutions, was expressly restrained by the 32nd chap. of Magna Charta, which was merely in affirmance of the common law on this subject, and which allowed the tenants of common or mesne lords—though not, it seems, such as held directly of the Crown—to dispose of a *reasonable part* of their lands to subfeudatories.

Stat. *Quia Emptores.*

The right of subinfeudation to the extent thus expressly allowed by statute, evidently prepared the way for the more extensive power of alienation which was conferred on mesne feudatories by the statute *Quia Emptores*, 18 Edw. 1, st. 1, c. 1. This statute, which effected, indeed, a most material change in the nature of the feudal tenure, by permitting the transfer or alienation of lands in lieu of subinfeudation, after stating, by way of preamble, that in consequence of this latter practice, the chief lords had many times lost their escheats, marriages, and wardships of land and tenements belonging to their fees, enacted, "that from henceforth it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands and tenements of the chief lord of the same fee, by such service and customs as his feoffee held before."

17 Edw. 2, c. 6.

This statute, it will be observed, did not extend to tenants *in capite;* and although by the subsequent Act, 17 Edw. 2, c. 6, *De Prærogativâ Regis*, it was declared

that no one holding of the Crown by military service can, without the king's licence, alien the *greater part* of his lands, so that enough shall not remain for the due performance of such service: from which it has been inferred that, prior to this enactment, tenants *in capite* possessed the same right of subinfeudation as ordinary feudatories possessed prior to the stat, *Quia Emptores;* yet it does not appear that even after the stat. *De Prærogativâ,* alienation of any part of lands held *in capite* ever occurred without the king's licence; and, at all events, this question was set at rest by the subsequent stat. 34 Edw. 3, c. 15, which rendered valid such alienations as had been made by tenants holding under Hen. 3, and preceding sovereigns, although there was a reservation of the royal prerogative as regarded alienations made during the reigns of the two first Edwards.

Having thus remarked, that, by a fiction of the feudal law, all land was held, either directly or (owing to the practice of subinfeudation) mediately of the Crown, we may next observe that gifts of land were in their origin simple, without any condition or modification annexed to them; and although limited or conditional donations were gradually introduced for the purpose of restraining the right of alienation, yet, since the Courts construed such limitations liberally, in order to favour that right which they were intended to restrain, the stat. of Westm. 2, 13 Edw. 1, usually called the statute *De Donis,* was passed, which enacted, "That the will of the giver according to the form in the deed of gift, manifestly expressed, shall be from henceforth observed, so that they to whom the land was given under such condition shall have no power to alien the land so given, but that it shall remain unto the issue of them to whom it was

Stat. *De Donis.*

given, after their death, or shall revert unto the giver, or his heir, if issue fail." The effect, therefore, of the above statute was to prevent a tenant in tail from alienating his estate for a greater term than that of his own life; or rather, its effect was to render the grantee's estate certain and indefeasible during the life of the tenant in tail only, upon whose death it became defeasible by his issue or the remainder-man or reversioner (*c*).

Prior to this Act, indeed, where land was granted to a man and the heirs of his body, the donee was held to take a conditional fee-simple, which became absolute the instant issue was born; but after the passing of the statute *De Donis*, the estate was, in contemplation of law, divided into two parts, the donee taking a new kind of particular estate, which our judges denominated a fee-tail, the ultimate fee-simple of the land expectant on the failure of issue remaining vested in the donor.

"At last," says Lord *Mansfield*, C.J. (*d*), "the people having groaned for two hundred years under the inconveniences of so much property being unalienable; and the great men, to raise the pride of their families, and (in those turbulent times) to preserve their estates from forfeitures, preventing any alteration by the legislature," the judges adopted various modes of evading the statute *De Donis*, and of enabling tenants in tail to charge or alien their estates (*e*). The first of these was founded on the idea of a recompense in value; in consequence of which it was held, that the issue in tail was bound by the warranty of his ancestor, where assets of equal

Evasion of stat. *De Donis*.

(*c*) 1 Cruise, Dig., 4th ed., 77, 78.

(*d*) *Taylor* v. *Horde*, 1 Burr. 115.

(*e*) In *Mary Portington's case*, 10 Rep. 35, b., it was held, in accordance with prior authorities, that tenant in tail could not be restrained by any condition or limitation from suffering a common recovery.

value descended to him from such ancestor. In the next place, they held, in the reign of Edw. 4, that a feigned recovery should bar the issue in tail and the remainders and reversion (*f*). And, by the stat. 32 Hen. 8, c. 36, the legislature expressly declared that a fine should be a bar to the issue in tail (*g*).

Further, under the Act for abolishing fines and recoveries, 3 & 4 Will. 4, c. 74, a tenant in tail may, by any species of deed duly enrolled, and otherwise made in conformity with the Act, absolutely dispose of the estate of which he is seised in tail in the same manner as if he were absolutely seised thereof in fee (*h*); and the sale of "settled estates" (*i*) is, by the stat. 19 & 20 Vict. c. 120 (amended and extended by 21 & 22 Vict. c. 77 (*k*)) and the Settled Estates Act, 1882, hereinafter mentioned, much facilitated. 3 & 4 Will. 4, c. 74.

Having thus seen in what manner the restrictions which were, in accordance with the spirit of the feudal laws, imposed upon the alienation of land by *deed*, have been gradually relaxed, we must further observe, that the power of disposing of land by *will* was quite as much opposed to the policy of those laws; and, consequently, although land in this country was devisable until the conquest, yet it shortly afterwards ceased to be

(*f*) *Taltarum's case*, Yr. Bk. 12 Edw. 4, 14, 19, where the Court expressly founded their argument upon the assumption that a recovery properly suffered would destroy an entail, although they decided that, under the particular circumstances of that case, the entail had not been destroyed.

(*g*) Except where the reversion was in the Crown, 34 & 35 Hen. 8, c. 20. As to the respective effects of the stats. 4 Hen. 7, c. 24, and 32 Hen. 8, c. 36, see Mr. Hargrave's note (1), Co. Litt. 121, a.

(*h*) See 1 Cruise, Dig., 4th ed., 83.

(*i*) For the statutory signification of this term, see the interpretation clause (s. 1).

(*k*) See also 27 & 28 Vict. c. 45, s. 3.

so, and, in fact, remained inalienable by will (*l*) until the stats. 32 Hen. 8, c. 1, and 34 & 35 Hen. 8, c. 5; the latter of which statute is explanatory of the former, and declares that every person (except as therein mentioned) having a sole estate or interest or being seised in fee-simple of and in any manors, lands, tenements, rents, or other hereditaments in possession, reversion, remainder, or of rents or services incident to any reversion or remainder, shall have full and free liberty, power, and authority to give, dispose, will, or devise to any person or persons (except bodies politic and corporate) by his last will and testament in writing, all his said manors, lands, tenements, rents, and hereditaments, or any of them, at his own free will and pleasure. It is, indeed, true, that, by the above statutes, some restriction was imposed upon the right of alienating by will lands held by military tenure; yet, since such tenures were, by the stat. 12 Car. 2, c. 24, converted into free and common socage tenures, we do, in fact, derive from the Acts passed in the reign of Hen. 8, the important right of disposing by will of all (except copyhold) (*m*) lands and tenements: a privilege which has received some important extensions by the modern stat. 1 Vict. c. 26 (amended by 15 & 16 Vict. c. 24), and which now attaches to all real and personal estate to which an individual may be entitled, either at law or in equity at the time of his death (*n*).

1 Vict. c. 26.

Right of alienation at common law.

It remains to consider how far the right of alienation exists at common law, when viewed without reference to the arbitrary restrictions which were imposed under the

(*l*) A tenant in gavelkind, however, could devise by will prior to the Statute of Wills: Wright, Tenures, 207.

(*m*) As to which see now, 1 Vict. c. 26, s. 3; Shelf. Copyholds, 52.

(*n*) S. 3.

feudal system, and to show in what manner this right has been recognised and favoured by our courts of law, and encouraged by the legislature. And in the first place, we must observe, that the *potestas alienandi*, or right of alienation is a right necessarily incident, in contemplation of law, to an estate in fee-simple; it is inseparably annexed to it, and cannot, in general, be indefinitely restrained by any proviso or condition whatsoever (*o*); for, although a "fee-simple" is explained by *Littleton* (*p*) as being *hæreditas pura*, yet it is not so described as importing an estate purely allodial (for we have already seen that such an estate did not, in fact, exist in this country), but because it implies a simple inheritance, clear of any condition, limitation, or restriction to any particular heirs, and descendible to heirs general, whether male or female, lineal or collateral (*q*). In illustration of the above incident of an estate in fee-simple, we find it laid down (*r*), that "if a man makes a feoffment on condition that the feoffee shall not alien to any, the condition is void; because, where a man is enfeoffed of land or tenements, he has power to alien them to any person by the law; for, if such condition should be good, then the condition would oust him of the whole power which the law gives him, which would be against reason, and therefore such condition is void." A testator devised land to A. B. and his heirs for ever; but, in case A. B. died without heirs, then to C. D. (who was a stranger in blood to A. B.) and his heirs; and, in case A. B. offered to mortgage or suffer a fine or recovery upon the whole or any part

(*o*) 4 Cruise, Dig., 4th ed., 330. And see the analogous cases, cited *post*, pp. 452, 455.

(*p*) S. 1.

(*q*) Wright, Tenures, 147.

(*r*) *Mildmay's case*, 6 Rep. 42; Co. Litt. 206. b.

thereof, then to the said C. D. and his heirs. It was held, that A. B. took an estate in fee, with an executory devise over, to take effect upon the happening of conditions which were void in law, and that a purchaser in fee from A. B. would have a good title against all persons claiming under the said will (*s*). So, if a man, before the statute *De Donis*, had made a gift to one and the heirs of his body, after issue born, he had, by the common law, *potestatem alienandi;* and, therefore, if the donor had in such a case added a condition, that, after issue the donee should not alien, the condition would have been repugnant and void. And, by like reasoning, if, after the statute, a man had made a gift in tail, on condition that the tenant in tail should not suffer a common recovery, such condition would have been void; for, by the gift in tail, the tenant has an absolute power given to suffer a recovery, and so to bar the entail (*t*). And here we may conveniently remark, that the distinction which exists between real and personal property is further illustrative of the present subject; for, with respect to the latter, it is laid down, that, where an estate tail in things personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation; for this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail; and, therefore, the law vests in him at once the entire dominion of goods, being analogous to the fee-simple which a tenant in tail may acquire in real estate (*u*).

(*s*) *Ware* v. *Cann*, 10 B. & C. 433.

(*t*) 6 Rep. 41; Arg., *Taylor* v. *Horde*, 1 Burr. 84; *Corbet's case*, 1 Rep. 83; *Portington's case*, 10 Rep. 35.

(*u*) 2 Com. by Broom & Hadley, 593, 611.

We may, in connection with this subject, likewise refer to Sir *W. Blackstone's* celebrated judgment in *Perrin* v. *Blake* (*x*), where a distinction is drawn between those rules of law which are to be considered as the fundamental rules of the property of this kingdom (*y*), and which cannot be exceeded or transgressed by any intention of a testator, however clearly or manifestly expressed, and those rules of a more arbitrary, technical, and artificial kind, which the intention of a testator may control. Amongst rules appertaining to the first of these two classes, Sir *W. Blackstone* mentioned these:—1st, that every tenant in fee-simple or fee-tail shall have the power of alienating his estates by the several modes adapted to their respective interests; and 2ndly, that no disposition shall be allowed which, in its consequence, tends to a perpetuity (*z*). Mr. Butler, moreover, remarks (*a*), with reference to the case from Littleton above cited, that it "is one of the many attempts which have been made at different times to prevent the exercise of that right of alienation which is inseparable from the estate of a tenant in tail."

Restraint upon perpetuities by devise.

Not only will our Courts oppose the creation of a perpetuity by deed, but, they will likewise frustrate the attempt to create it by will; and, therefore, "upon the introduction of executory devises, and the indulgence thereby allowed to testators, care was taken that the property which was the subject of them should not be tied up beyond a reasonable time, and that too great a restraint upon alienation should not be permitted" (*b*). The rule

(*x*) Hargrave's Tracts, fol. 500.

(*y*) See, also, *Egerton* v. *Earl Brownlow*, 4 H. L. Cas. 1, *passim*.

(*z*) Mr. Butler's note, Co. Litt. 376, b. (1.)

(*a*) Co. Litt. 381, a. note.

(*b*) Judgm., *Cadell* v. *Palmer*, 10 Bing. 142. See *Ware* v. *Cann*, 10 B. & C. 433.

is accordingly well established, that, although an estate may be rendered inalienable during the existence of a life or of any number of lives in being, and twenty-one years after, or, possibly, even for nine months beyond the twenty-one years, in case the person ultimately entitled to the estate should be an infant *in ventre sa mère* (c), at the time of its accruing to him, yet that all attempts to postpone the enjoyment of the fee for a longer period are void (*d*).

Trusts for accumulation.

With respect to trusts for accumulation, we may observe, that these are now regulated by stat. 39 & 40 Geo. 3, c. 98, an Act which was passed in consequence of the will of the late Mr. Thellusson, and subsequently to the decision establishing the validity of that will in the well-known case of *Thellusson* v. *Woodford* (e). The above-mentioned statute enacts, that no person shall thenceforth, by any deed, surrender, will, codicil, or otherwise, settle or dispose of any real or personal property, so that the rents or produce thereof shall be wholly or partially accumulated for any longer term than the life of the grantor or settlor, or the term of twenty-one years from the death of the grantor, settlor, or testator, or during the minority or respective minorities of any person or persons who

(c) In an executory devise, the period of gestation may be reckoned both at the beginning and the end of the twenty-one years; thus, if land is devised with remainder over in case A.'s son die under the age of twenty-one, and A. dies leaving a son *in ventre sa mère*, then if the son marries in his 21st year, and dies leaving his widow *enciente*, the estate vests, nevertheless, in the infant *in ventre sa mère*, and does not go over. See, *per* Lord Eldon, C., *Thellusson* v. *Woodford*, 11 Ves. jun. 149.

(*d*) *Cadell* v. *Palmer*, 10 Bing. 140. See *Lord Dungannon* v. *Smith*, 12 Cl. & Fin. 546, distinguished in *Christie* v. *Gosling*, L. R. 1 H. L. 279, 292; *Spencer* v. *Duke of Marlborough*, 3 Bro. P. C. 232.

(*e*) 4 Ves. jun. 227; S. C., 11 *Id.* 112, in which case Mr. Hargrave's argument respecting perpetuities is well worthy of perusal.

shall be living, or *in ventre sa mère*, at the time of the death of such grantor or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurance, directing such accumulations, would, for the time being, if of full age, be entitled to the rents or annual produce so directed to be accumulated.

Exception to rule.

It will be evident, from the preceding remarks and cases already cited, that the rule against perpetuities is observed by courts both of law and of equity (*f*). In consequence, however, of the peculiar jurisdiction which courts of equity exercise, for the protection of the interests of married women, the right of alienation has, in one case, with a view to their benefit, been restricted, and that restriction thus imposed may, in fact, be regarded as an exception to the operation of the maxim in favour of alienation, which we have been considering. It is now fully established, that where property is conveyed to the separate use of a married woman in fee, with a clause in restraint of anticipation, such clause is valid; for equity, having in this instance created a particular kind of estate, will reserve to itself the power of modifying that estate in such manner as the Court may think fit, and will so regulate its enjoyment as to effect the purpose for which the estate was originally created (*g*). The law upon this subject may be considered to have been finally settled by the decisions in *Tullett* v. *Armstrong* (*h*), and *Scarborough* v. *Borman* (*i*), where Lord *Cottenham*, C., after an

Feme covert.

Tullett v. *Armstrong.*

(*f*) See, also, *per* Wilmot, C.J., *Bridgeman* v. *Green*, Wilmot, Opin. 61.

(*g*) See, *per* Lord Lyndhurst, C., *Baggett* v. *Meux*, 1 Phill. 627; S. C., 1 Coll. 138.

(*h*) 4 My. & Cr. 377, 390. See *Wright* v. *Wright*, 2 Johns. & Hem. 647, 652.

(*i*) 4 My. & Cr. 378.

elaborate review of the cases and authorities, held that a gift to the sole and separate use of a woman, whether married or unmarried, with a clause against anticipation, was good against an after-acquired husband; and this decision has been in subsequent cases fully recognised and adopted (*k*).

The reason of the rule thus established is fully stated by his lordship, in a subsequent case, in these words:— "When first, by the law of this country, property was settled to the separate use of the wife, equity considered the wife as a *feme sole*, to the extent of having a dominion over the property. But then it was found that that, though useful and operative, so far as securing to her a dominion over the property so devoted to her support, was open to this difficulty—that she, being considered as a *feme sole*, was of course at liberty to dispose of it as a *feme sole* might have disposed of it, and that, of course, exposing her to the influence of her husband, was found to destroy the object of giving her a separate property; therefore, to meet that, a provision was adopted of prohibiting the anticipation of the income of the property, so that she had no dominion over the property till the payments actually became due" (*l*). To the above exposition of the doctrine of Courts of Equity we must add that, by various sections of the stat. 20 & 21 Vict. c. 85, for amending the law relating to divorce and matrimonial causes, a *feme covert* will, for her protection, be considered as a *feme sole* with respect to her acquired property, and for the purposes of suing and contracting (*m*).

(*k*) *Baggett* v. *Meux*, *supra*, and see 45 & 46 Vict. c. 75, s. 19.

(*l*) *Per* Lord Cottenham, *Rennie* v. *Ritchie*, 12 Cl. & Fin. 234.

(*m*) See ss. 21, 25, 26.

Conformable to the spirit of the elementary maxim now under consideration is the stat. 20 & 21 Vict. c. 57, intituled "An Act to enable married women to dispose of reversionary interests in personal estate."

Alienation of personalty favoured.

Having thus observed that our law favours the alienation of real property, or to use the words of Lord *Mansfield*, that "the sense of wise men, and the general bent of the people in this country, have ever been against making land perpetually unalienable:" and having seen that "the utility of the end was thought to justify any means to attain it" (*n*), it remains to add, that the same policy obtains with reference to personalty; and, in support of this remark, may be adduced the well-known rule of the law merchant, that for the encouragement of commerce, the right of survivorship, which is ordinarily incident to a joint tenancy, shall not exist amongst trading partners—*jus accrescendi inter mercatores pro beneficio commercii locum non habet* (*o*),—a rule which applies to manufacturers as well as to merchants (*p*)—to trade fixtures also, which, being removable, are part of the stock in trade—and has been (*q*) extended to real as well as personal property: so that all property, whatever be its nature, purchased with partnership capital for the purposes of the partnership trade, continues to be partnership capital, and to have to every intent the quality of personal estate (*r*),

Jus accrescendi inter mercatores.

(*n*) *Per* Lord Mansfield, C.J., 1 Burr. 115.

(*o*) Co. Litt. 182, a; Brownl. 99; Noy, Max., 9th ed., 79; 1 Beawes, Lex Merc., 6th ed. 42.

(*p*) *Buckley* v. *Barber*, 6 Exch. 164, by comparing which case with *Crossfield* v. *Such*, 8 Exch. 825, and *Morgan* v. *Marquis*, 9 Exch. 145, the signification and operation of the maxim, as to *jus accrescendi*, will be perceived.

(*q*) *Buckley* v. *Barber*, *supra*.

(*r*) Frechold lands bought with partnership money and used for partnership purposes is treated as personalty, *Waterer* v. *Waterer*, L. R. 15 Eq. 402; Smith's Mercantile Law,

unless, indeed, a special stipulation be made between the partners to prevent the application of this equitable doctrine (*s*). The rule which thus holds in cases of partnership evidently favours alienation, by rendering capital invested in trade applicable to partnership purposes, and directly available to the creditors of the firm.

We have already had occasion to observe, that there cannot be an estate tail in personalty (*t*); so neither can a perpetuity be created in property of this description. Indeed, where the subject-matter of a grant is a personal chattel, it is impossible so to tie up the use and enjoyment of it as to create in the donee a life estate which he may not alien. It is true, however, that this object may be attained indirectly, in a manner consistent with the known rules of law, by annexing to the gift a forfeiture or defeasance on the happening of a particular event, or on a particular act being done; for in that case the donee takes by the limitation a certain estate, of which the event or act is the measure, and upon the happening of the event or the doing of the act, a new and distinct estate accrues to a different individual. If, for instance, a testator be desirous to give an annuity without the power of anticipation, he can only do so by declaring that the

9th ed., 169, and see *Phillips* v. *Phillips*, 1 My. & K. 663; and in *Fereday* v. *Wightwick*, 1 Russ. & My. 49; *Townshend* v. *Devaynes*, 1 Mont., Partnership, 2nd ed., note, p. 96 (2 A.); *per* Lord Eldon, C., *Selkrig* v. *Davis*, 2 Dow, 242; *Houghton* v. *Houghton*, 11 Sim. 491; *Crawshay* v. *Maule*, 1 Swanst. 521, cited *Baxter* v. *Newman*, 8 Scott, N. R. 1035; *Phillips* v. *Phillips*, *supra*, was overruled as to a different point therein decided by *Taylor* v. *Taylor*, 3 De G. M. & G. 190.

(*s*) *Balmain* v. *Shore*, 9 Ves. jun., 500.

(*t*) As to heir-looms, see the maxim *Accessorium sequitur principale*, *post*. As to annexing personal to real estate, the latter being devised in strict settlement, see 2 Jarm., Wills, 2nd ed., 492.

act of alienation shall determine the interest of the legatee, and create a new interest in another (*u*).

Limitation of interest.

Property may also be given to a party to be enjoyed by him until he becomes bankrupt; and if this event should happen, the property may be given over to another party. A person cannot, however, create an absolute interest in property and, at the same time, deprive the party to whom that interest was given of those incidents and of that right of alienation which belonged, according to the elementary principles of the common law, to the ownership of the estate. Where, therefore, a testator directed his trustees to pay an annuity to his brother, until he should attempt to charge it, or some other person should claim it, and then to apply it for his support and maintenance, it was held that, on the insolvency of the annuitant, his assignees became entitled to the annuity (*x*).

The distinction between a proviso or condition subsequent and a limitation above exemplified, may be further explained in the words of Lord *Eldon*, who says: "There is no doubt that property may be given to a man until he shall become bankrupt. It is equally clear, generally speaking, that, if property is given to a man for his life, the donor cannot take away the incidents to a life estate, and * * *, a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a *proviso* that he shall not sell or alien it. If that condition is so expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited (*y*).

(*u*) *Per* Lord Brougham, 2 My. & K. 204.

(*x*) *Younghusband* v. *Gisborne*, 1 Colly. 400.

(*y*) *Brandon* v. *Robinson*, 18 Ves. 433, 434. See Jarman on Wills, 4th

Settled Estates Act, 1882.

A most important extension of the maxim that the law favours alienation is to be found in a recent statute called the Settled Estates Act, 1882 (*z*), by which under certain conditions the tenant for life of a settled estate, may sell the property as against the remainderman, and against his consent (*a*), and conversely it would seem that the tenant for life can restrain the sale of any portion of the property by the trustees of the settlement, whether his consent is or is not required by the settlement (*b*). It does not come within the scope of this work to enter minutely into the details of this statute, but the foregoing cases will illustrate how largely the legislature has interfered with the power of an owner of property to prevent its alienation in the hands of those to whom he has granted it.

CUJUS EST DARE EJUS EST DISPONERE. (*Wing. Max.* 53.) —*The bestower of a gift has a right to regulate its disposal* (*c*).

Derivation of rule.

It will be evident, from a perusal of the preceding pages, that the above general rule must, at the present day, be received with very considerable qualification. It does, in fact, set forth the principle on which the old feudal system of feoffment depended; *tenor est qui legem dat feudo* (*d*)—it is the tenor of the feudal grant which

ed. Vol. II. p. 22. A covenant prohibiting alienation, except to a certain specified and limited class, held repugnant to the nature of an estate in fee simple and void. *Morris* v. *Morris*, 6 T. R. C. L. 73.

(*z*) 45 & 46 Vict. c. 38.

(*a*) *Thomas* v. *Williams*, 52 L. J. Ch. 603.

(*b*) Duke of Newcastle's Settled Estates, 52 L. J. Ch. 645.

(*c*) Bell, Dict. & Dig. of Scotch Law, 242.

(*d*) Craig, Jus Feud., 3rd ed., 66.

regulates its effect and extent: and the maxim itself is, in another form, still applicable to modern grants—*modus legem dat donationi* (*e*)—the bargainor of an estate may, since the land moves from him, annex such conditions as he pleases to the estate bargained, provided that they are not illegal, repugnant, or impossible (*f*). Moreover, it is always necessary that the grantor should expressly limit and declare the continuance and quantity of the estate which he means to confer; for, by a bare grant of lands, the grantee will take an estate for life only, a feoffment being still considered as a gift, which is not to be extended beyond the express limitation or manifest intention of the feoffor (*g*). As, moreover, the owner may, subject to certain beneficial restrictions, impose conditions at his pleasure upon the feoffee, so he may likewise, by insertion of special covenants in a conveyance or demise reserve to himself rights of easement and other privileges in the land so conveyed or demised, and thus surrender the enjoyment of it only partially, and not absolutely, to the feoffee or tenant. "It is not," as remarked by Lord *Brougham*, C. (*h*), at all inconsistent with the nature of property, that certain things should be reserved to the reversioners all the while the term continues. It is only something taken out of the demise—some exception to the temporary surrender of the enjoyment: it is only that they retain more or less partially the use of what was wholly used by them before the demise, and what will again be wholly used by them when that demise is at an end."

Reservation in demise of land.

It must not, however, therefore be inferred that "inci-

(*e*) Co. Litt. 19. a.
(*f*) 2 Rep. 71.
(*g*) Wright, Tenures, 151, 152.
(*h*) 2 My. & K. 536, 537.

dents of a novel kind can be devised and attached to property at the fancy or caprice of any owner" (*i*). "No man," remarks Lord *St. Leonards*, in *Egerton* v. *Earl Brownlow* (*k*), "can attach any condition to his property which is against the public good," nor can he "alter the usual line of descent by a creation of his own. A man cannot give an estate in fee simple to a person and his heirs on the part of his mother. Why? Because the law has already said how a fee simple estate should descend" (*l*).

It is further to be observed that it is not in the power of an owner of land to create rights not connected with its use or enjoyment and to annex them to it, nor can he subject the land to a new species of burden, so as to bind it in the hands of an assignee; thus, in the well-known case of *Ackroyd* v. *Smith* (*m*), the plaintiff and his mortgagee had granted to the defendants' predecessors in title, their heirs and assigns, certain premises, together with the right and privilege of passing and repassing for all purposes along a certain road. It was held that as the right or privilege was to use the road for all purposes, it was not a right incidental to the enjoyment of the premises granted, and, therefore, was not appurtenant to them, and was not assignable, and that the defendants who justified their user of the road under the grant as assignees must be treated as trespassers.

It is questionable how far in the present day this case would be followed as between grantor and assignee of the

(*i*) *Per* Lord Brougham, C., 2 My. & K. 535; *Ackroyd* v. *Smith*, 10 C. B. 164; *Bailey* v. *Stephens*, 12 C. B. N. S. 91; *Ellis* v. *Mayor, &c., of Bridgnorth*, 15 C. B. N. S. 52, 78; *Tulk* v. *Moxhay*, 2 Phill. 774; *Hill* v. *Tupper*, 2 H. & C. 121, 128; *per* Cresswell, J., and Watson, B., in *Rowbotham* v. *Wilson*, 8 E. & B. 123: S. C., 8 H. L. Cas. 348.

(*k*) 4 H. L. Cas. 241, 242.

(*l*) See also *Marquis of Salisbury* v. *Gladstone*, 9 H. L. Cas. 241.

(*m*) 10 C. B. 164.

right, now that equitable principles prevail in all the Courts; it seems inequitable that the grantor of the right should be able to disregard his own act and sue as trespassers the successors in title of those to whom he has given the right, the enjoyment of which he seeks to restrain. The case is, however, an authority for the proposition we have stated, and has been followed in recent times (*n*).

Landlord and tenant

"The general principle," says Mr. Justice *Ashhurst* (*o*), "is clear, that the landlord having the *jus disponendi* may annex whatever conditions he pleases to his grant, provided they be not illegal or unreasonable." It is, for instance, reasonable that a landlord should exercise his judgment with respect to the person to whom he trusts the management of his estate; and, therefore, a covenant not to assign is legal; and ejectment will lie on breach of such a covenant (*p*).

On this principle, likewise, an agreement by defendant to allow plaintiff, with whom he cohabited, an annuity for life, provided she should continue single, was held to be valid, for this was only an original gift, with a condition annexed; and *cujus est dare ejus est disponere*. Moreover, the grant of the annuity was not an inducement to the plaintiff to continue the cohabitation, it was rather an inducement to separate (*q*).

Another remarkable illustration of the *jus disponendi* presents itself in that strict compliance with the wishes of

(*n*) *Egerton* v. *Lord Brownlow*, 4 H. L. Cases, 1; *Hill* v. *Tupper*, 2 H. & C. 121; *Re Stockport Waterworks*, 3 H. & C. 300.

(*o*) *Roe* d. *Hunter* v. *Galliers*, 2 T. R. 137.

(*p*) *Per* Ashhurst, J., 2 T. R. 138.

(*q*) *Gibson* v. *Dickie*, 3 M. & S. 463, cited Arg., *Parker* v. *Rolls*, 14 C. B. 697.

the grantor, which was formerly (*r*) regarded as essential to the due execution of a power (*s*).

ASSIGNATUS UTITUR JURE AUCTORIS. (*Halk. Max.*, p. 14.)—*An assignee is clothed with the rights of his principal* (*t*).

It is laid down as a general and leading rule with reference to alienations and forfeitures, that *quod meum est sine facto meo vel defectu meo amitti vel in alium transferri non potest* (*u*), where *factum* may be translated "alienation," and *defectus* "forfeiture," (*x*); and it seems desirable to preface our remarks as to the rights and liabilities which pass by the transfer of property, by stating this elementary and obvious principle, that where property in land or chattels has once been effectively and indefeasibly acquired, the right of property can only be lost by some act amounting to alienation or forfeiture on the part of the owner or his representatives.

Who is an assignee.

An "assignee" is one who, by such act as aforesaid,

(*r*) By 1 Vict. c. 26, s. 10, every will executed as prescribed by that Act will be a valid execution of a power of appointment by will, although other required solemnities may not have been observed. This Act, however, does not extend to any will made before January 1st, 1838.

(*s*) *Rutland* v. *Doe* d. *Wythe*, 12 M. & W. 357, 373, 378; S. C., 10 Cl. & Fin. 419; *Doe* d. *Earl of Egremont* v. *Burrough*, 6 Q. B. 229; *Doe* d. *Blomfield* v. *Eyre*, 3 C. B. 557.

(*t*) "*Auctores*" *dicuntur a quibus jus in nos transiit.* Brisson. ad verb. "*Auctor.*"

(*u*) This maxim is well illustrated by *Vyner* v. *Mersey Docks, &c., Board*, 14 C. B. N. S. 753.

(*x*) 1 Prest., Abs. Tit., 147, 318. The kindred maxims are, *Quod semel meum est amplius meum esse non potest*, Co. Litt. 49, b.; *Duo non possunt in solido unam rem possidere*, Co. Litt. 368, a. See 1 Prest., Abs. Tit. 318; 2 *Id.* 86, 286; 2 Dods., Adm. R. 157; 2 Curt. 76.

or by the operation of law, as in the event of death, possesses a thing or enjoys a benefit; the main distinction between an *assignee* (*y*) and a *deputy* being, that the former occupies in his own right, whereas the latter occupies in the right of another (*z*).

A familiar instance of the first mode of transfer just mentioned presents itself in the assignment of a lease by deed; and of the second, in the case of the heir of an intestate who is an assignee in law of his ancestor (*a*).

Further, under the term "assigns" (*b*) is included the assignee of an assignee *in perpetuum* (*c*), provided the interest of the person originally entitled is transmitted on each successive devolution of the estate or thing assigned; for instance, the executor of A.'s executor is the assignee of A., but not so the executor of A.'s administrator, or the administrator of A.'s executor, who is in no sense the representative of A., and to whom, therefore, the unadministered residue of A.'s estate will not pass.

In order to place in a clear light the general bearing and application of the maxim *assignatus utitur jure auctoris*, we propose to inquire, first, as to the quantity; and, secondly, as to the quality or nature of the interest in property which can be assigned by the owner to another party. And, 1st, it is a well-known rule, im-

(*y*) See *Bromage* v. *Lloyd*, 1 Exch. 32; *Bishop* v. *Curtis*, 18 Q. B. 878; *Lysaght* v. *Bryant*, 9 C. B. 46.

(*z*) Perkin's Prof. Bk., s. 100; Dyer, 6.

(*a*) *Spencer's case*, 5 Rep. 16.

(*b*) As to the meaning of the word "assigns" in a covenant, see Judgm., *Baily* v. *De Crespigny*, L. R. 4 Q. B. 186.

See also *Mitcalfe* v. *Westaway*, 17 C. B. N. S. 658. An underlease of the whole term amounts to an assignment, *Beardman* v. *Wilson*, L. R. 4 C. P. 57.

(*c*) Co. Litt. 384, b.

ported into our own from the civil law, that no man can transfer a greater right or interest than he himself possesses—*Nemo plus juris ad alium transferre potest quam ipse haberet* (*d*). The owner, for example, of a base or determinable fee can do no more than transfer to another his own estate, or some interest of inferior degree created out of it; and if there be two joint tenants of land, a grant or a lease by one of them will operate only on his own moiety (*e*). In like manner, where the grantor originally possessed only a temporary or revocable right in the thing granted, and this right becomes extinguished by efflux of time or by reservation, the title of the assignee must, of course, cease to be valid, according to the rule *resoluto jure concedentis resolvitur jus concessum* (*f*). We find it, however, laid down that the maxim above mentioned, which is one of the leading rules as to titles, or the equivalent maxim, *non dat qui non habet*, did not, prior to the stat. 8 & 9 Vict. c. 106, apply to wrongful conveyances or tortious acts (*g*); for instance, before the passing of that Act, if a tenant for years made a feoffment, this feoffment vested in the feoffee a defeasible estate of freehold; for, according to the ancient doctrine, every person having possession of land, however slender, or however tortious his possession might be, was, nevertheless (unless, indeed, he were the mere bailiff of the party having title), considered to be in of the seisin in fee, so as to be able by livery to transfer it to another; and, consequently, if, in the case above supposed, the feoffee had, subsequently to the conveyance, levied a fine, such fine would, at the end of five years after the expira-

What amount of interest can be assigned.

Qualification of rule upon this subject.

(*d*) D. 50. 17. 54; Wing. Max., p. 56.
(*e*) 3 Prest., Abs. Tit., 25, 222.
(*f*) Mackeld., Civ. Law, 179.
(*g*) 3 Prest., Abs. Tit., 25; *Id.* 244.

tion of the term, have barred the lessor (*h*). But now, by sect. 4 of the statute just cited (*i*), a feoffment "shall not have any tortious operation."

In connection with copyhold law also, an exception presents itself to the elementary rule above noticed, for the lord of a manor having only a particular interest therein as tenant for life, may grant by copy for an estate which may continue longer than his own estate in the manor, or for an estate in reversion, which may not come into possession during the existence of his own estate (*k*). The special principle on which the grants of a lord *pro tempore* stand good after his estate has ceased, being that the grantee's estate is not derived out of the lord's only, but stands on the custom (*l*).

Rule holds generally in mercantile transactions

In mercantile transactions, as well as in those connected with real property, the general rule undoubtedly is, that a person cannot transfer to another a right which he does not himself possess. The law does not "enable any man by a written engagement to give a floating right of action at the suit of any one into whose hands the writing may come, and who may thus acquire a right of action better than the right of him under whom he derives title (*m*).

Of the rule above stated, a familiar instance is noticed by M. Pothier, who observes that, where prescription has begun to run against a creditor, it will continue to do so as against his heir, executors, or assigns, for the latter

(*h*) The reader will find this subject elaborately considered in Mr. Butler's note (1) Co. Litt. 330, b.; *Machell* v. *Clarke*, 2 Lord Raym. 778; 1 Cruise, Dig., 4th ed., 80.

(*i*) See Shelford, Real Prop. Stats., 6th ed., 595.

(*k*) Shelford, Copyholds, 20.

(*l*) *Id. ibid.*

(*m*) *Per* Lord Cranworth, C., *Dixon* v. *Bovill*, 3 Macq. Sc. App. Cas. 16.

succeed only to the rights of their principal, and cannot stand in a better position than he did himself, *nemo plus juris in alium transferre potest quam ipse habet* (*n*). The assignee of a mortgagee cannot stand in any different character, or hold any different position from that of the mortgagee himself, although the mortgagor may not have been a party to the assignment (*o*). So the indorsee of an order for the delivery of goods acquires by the indorsement no better title and no higher right than the indorser had before (*p*); nor could the assignee of such an order sue upon it (*q*). However, in considering hereafter maxims applicable to the law of contracts (*r*), we shall have occasion to notice several cases which are directly opposed in principle to the rule now under review. Bearing upon this part of the subject we find in a recent case (*s*) the following remarks :—"The general rule of law is undoubted, that no one can transfer a better title than he himself possesses, *Nemo dat quod non habet.* To this there are some exceptions, one of which arises out of the rule of the law-merchant as to negotiable instruments, which may shortly be defined, as instruments the delivery whereof from one man to another passes the legal right to the property secured (or represented) thereby (*t*). These being part of the currency are subject to the same rule as money; and if a negotiable instrument, such as a bill of exchange, be transferred before it is overdue, it becomes

Exceptions to rule.

(*n*) 2 Pothier, Oblig., 263. The maxim *supra* is also applied *per* Parke, B., *Awde* v. *Dixon*, 6 Exch. 872.

(*o*) *Walker* v. *Jones*, L. R. 1 P. C. 50, 61.

(*p*) *Griffiths* v. *Perry*, 1 E. & E. 680, 689.

(*q*) *Dixon* v. *Bovill*, 3 Macq. Sc. App. Cas. 1.

(*r*) Chap. IX.

(*s*) *Whistler* v. *Forster*, 14 C. B. N. S. 248, 257-8. See *Deuters* v. *Townsend*, 5 B. & S. 613, 616.

(*t*) See Smith's Mercantile Law, 7th ed., 538.

available in the hands of a holder who takes it *bonâ fide* and for value, notwithstanding fraud, which would have rendered it unavailable in the hands of a previous holder. This rule, however, is only intended to favour transfers in the ordinary and usual manner, whereby a title is acquired according to the law-merchant.

Further, by a sale in market overt, one wrongfully in possession of a chattel may convey a good title to a *bonâ fide* purchaser; and, where possession of goods, coupled with the property in them, has been obtained by fraud, a *bonâ fide* purchaser for value without notice of the fraud is not affected by it; thus, where D. and Co. deposited certain goods with the plaintiffs as security for an advance, and afterwards obtained possession of the goods by fraudulently representing to the plaintiffs that they had sold them to the defendants, and would hand over to the plaintiffs the money to be received in payment, but in fact deposited the goods with the defendants, with a power of sale as security for an advance, it was held that as the plaintiffs had parted with their special property in the goods to D. and Co., they could not recover them from the defendants, who had obtained them *bonâ fide* and for a good consideration (*u*).

Again, if the true owner of goods permits another to hold himself out as the real owner, as by entrusting him with the documents of title to goods for certain limited purposes, a third person who *bonâ fide* deals with the agent as the owner of the goods may acquire a good title to them as against the true owner (*x*).

Another remarkable exception to the rule occurs in Indorsee of bill of lading.

(*u*) *Babcock* v. *Lawson*, 5 Q. B. D. 284; 49 L. J. Q. B. 408.

(*x*) See the Factors Acts, 4 Geo. 4, c. 83; 6 Geo. 4, c. 94; 5 & 6 Vict. c. 39; 40 & 41 Vict. c. 39.

connection with the important subject of stoppage *in transitu*: for although, as between the consignor and consignee of goods, the title to the goods, and the question whether or not the property in them has passed, will depend upon the real contract entered into by the parties; yet, if the consignor and original owner indorses and delivers the bill of lading to the consignee, he thereby puts it in the power of the latter to transfer the property in the goods to a *bonâ fide* purchaser for a valuable consideration, and thus to deprive himself of any right of stoppage *in transitu* which he might have had as against the consignee prior to such transfer (*y*). "The actual owner of an indorsed bill of lading," said Tindal, C.J. (*z*), "may, undoubtedly, by indorsement, transfer a greater right than he himself has (*a*). It is at variance with the general principles of law, that a man should be allowed to transfer to another a right which he himself has not; but the exception is founded on the nature of the instrument in question, which being, like a bill of exchange, a negotiable instrument, for the general convenience of commerce, has been allowed to have an

(*y*) *Pease* v. *Gloahec*, L. R. 1 P. C. 219; *per* Erle, C.J., L. R. 2 C. P. 45.

(*z*) *Jenkyns* v. *Usborne*, 8 Scott, N. R. 523; S. S., 7 M. & Gr. 678. See further, as to the effect of indorsing a bill of lading, 18 & 19 Vict. c. 111, s. 1. Under this section the rights and liabilities of the indorsee of the bill of lading pass from him by indorsement over to a third person, *Dracachi* v. *Anglo-Egyptian Nav. Co.*, L. R. 3 C. P. 190; *Smurthwaite* v. *Wilkins*, 11 C. B. N. S. 842.

As to the effect of re-indorsing a bill of lading, see *Short* v. *Simpson*, L. R. 1 C. P. 248.

(*a*) See also Judgm., L. R. 2 P. C. 405, where the above exception to the general rule is said to be "founded on the negotiable quality of the document. It is confined to the case where the person who transfers the right is himself in actual and authorised possession of the document, and the transferee gives value on the faith of it, without having notice of any circumstance which would render the transaction neither fair nor honest."

effect at variance with the ordinary principles of law. But this operation of a bill of lading, being derived from its negotiable quality, appears to us to be confined to the case where the person who transfers the right is himself in possession of the bill of lading, so as to be in a situation to transfer the instrument itself, which is the symbol of the property itself" (*b*).

Amount of interest taken by assignee.

Having thus adverted to the amount or quantity of interest assignable, with reference more especially to the grantor, we must, in the next place, observe that, as a general rule, the assignee of property takes it subject to all the obligations or liabilities (*c*), and clothed with all the rights, which attached to it in the hands of the assignor (*d*); and this is in accordance with the maxim of the civil law, *qui in jus dominiumve alterius succedit jure ejus uti debet* (*e*). We have already given one instance illustrative of this rule, viz., where an heir or executor becomes invested with the right to property against which the Statute of Limitations has begun to run.

Assignee of a chose in action may sue for it in his own name.

We may here remark that, although formerly at law there was a distinction between the transfer of a chose in action and the transfer of the right to sue for the same, that distinction has largely ceased to exist since the

(*b*) See Judgm., *Gurney* v. *Behrend*, 3 E. & B. 633, 634; 1 Smith L. C., 8th ed., 825.

(*c*) See *White* v. *Crisp*, 10 Exch. 312.

(*d*) As to this rule in equity, see *Mangles* v. *Dixon*, 3 H. L. Cas. 702, cited *Higgs* v. *Assam Tea Co.*, L. R. 4 Ex. 396; *Rodger* v. *The Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393, 405; *Dickson* v. *Swansea Vale R. C.*, L. R. 4 Q. B. 44, 48. If a man gives a licence and then parts with the property over which the privilege is to be exercised, the licence is gone: *Colman* v. *Foster*, 1 H. & N. 37, 40.

(*e*) D. 50. 17. 177. pr. For instance, fee-simple estates are subject, in the hands of the heir or devisee, to debts of all kinds contracted by the deceased.

passing of the Judicature Act, 1873, by which an absolute assignment by writing, under the hand of the assignor of any debt, or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be deemed in law to pass and transfer the legal right to such debt or chose in action, and all legal and other remedies for the same (*f*).

Without attempting to enumerate the various rights which are assignable, either by the express act of the party, or by the operation of law, we may observe, generally, that the maxim, *assignatus utitur jure auctoris*, is subject to very many restrictions (*g*) besides those to which we have just alluded; for instance, although the assignee of the reversion in land is, by the common law, entitled to sue upon covenants in law (*h*), and has, under the stat. 32 Hen. 8, c. 34 (which applies only to leases by deed (*i*)), a right to sue on express covenants contained in the lease, yet the operation of this statute is confined to such covenants as are technically said to run with the land, that is, such as require something to be done which is in some manner annexed and

(*f*) Sect. 25, sub-sect. 6, Act, 1873, where the right to a debt or chattel in the hands of a third person is transferred to another, the latter should always give notice to the debtor or holder of the chattel, otherwise his title is incomplete: *Re Freshfield's Trusts*, 11 Ch. Div. 198. As to assignment of the beneficial interest in a policy of marine insurance, see 31 & 32 Vict. c. 86, s. 1.

(*g*) See *Sandrey* v. *Michell*, 3 B. & S. 405; *Young* v. *Hughes*, 4 H. & N. 76; *M'Kune* v. *Joynson*, 5 C. B. N. S. 218.

(*h*) See *Williams* v. *Burrell*, 1 C. B. 429; Coote, L. & T. 314; *Vyvyan* v. *Arthur*, 1 B. & C. 414; *Harper* v. *Burgh*, 2 Lev. 206.

(*i*) *Per* Lush, J., *Elliott* v. *Johnson*, L. R. 2 Q. B. 122, citing *Standen* v. *Christmas*, 10 Q. B. 135.

appurtenant to the land itself (*k*). Bills of exchange (*l*), promissory notes, and cheques (*m*) upon bankers, are in general assignable. And where a bill is indorsed in blank, the owner may hand it over to a third person to sue upon it on his behalf (*n*). In like manner, the legal effect of a marriage entered into prior to the passing of the Married Women's Property Act, 1882 (*o*), is to vest in the husband the right of reducing into possession the chattels real and choses in action generally of the wife, yet if he dies without having exercised this power, the above descriptions of property will survive to the wife (*p*). Now every woman married since the Act is entitled to have and to hold as her separate property all real and personal property which belonged to her at the time of marriage, or is acquired by or devolves upon her after marriage (*q*).

The rule also that a vested right of action is by death transferred to the personal representatives of the deceased is subject to some important exceptions, which will hereafter be referred to, and must, therefore, be applied with considerable caution (*r*).

The case of a pawn or pledge of a chattel should per-

(*k*) *Spencer's case*, 5 Rep. 16, 1st resolution; *Martyn* v. *Clue*, 18 Q. B. 661; *Martyn* v. *Williams*, 1 H. & N. 817; *Hooper* v. *Clark*, L. R. 2 Q. B. 200; *Stevens* v. *Copp*, L. R. 4 Ex. 20; *Thomas* v. *Hayward*, L. R. 4 Ex. 311; *Williams* v. *Hayward*, 1 E. & E. 1040; *Gorton* v. *Gregory*, 3 B. & S. 90; *Bennett* v. *Herring*, 3 C. B. N. S. 370; *Sharp* v. *Waterhouse*, 7 E. & B. 816.

(*l*) See *Harrop*, app., *Fisher*, resp., 10 C. B. N. S. 196.

(*m*) *Keene* v. *Beard*, 8 C. B. N. S. 372.

(*n*) *Law* v. *Parnell*, 7 C. B. N. S. 282. See Judgm., *Ingham* v. *Primrose*, 7 C. B. N. S. 85.

(*o*) 45 & 46 Vict. c. 75.

(*p*) *Per* Parke, B., *Gaters* v. *Madeley*, 6 M. & W. 426, 427; *Fleet* v. *Perrins*, L. R. 4 Q. B. 500, and cases there cited.

(*q*) Sect. 2.

(*r*) See the maxim, *Actio personalis moritur cum personâ*; *post*, Chap. IX.

haps also be referred to in connection with the principle, *assignatus utitur jure auctoris*, for here the pawnor retains a property in the chattel, qualified by the right vested in the pawnee; and a sale of the chattel by its owner would, therefore, transfer to the vendee that qualified right only which the vendor himself possessed (*s*). To constitute a valid pledge, there must, however, be a delivery of the chattel, either actual or constructive, to the pawnee (*t*), and if the pawnee parts with the possession of the chattel he may lose the benefit of his security, and will do so if such parting is absolute (*u*).

Absolute and special property.

Again, the well-known distinction between *absolute* and *special* property may be adverted to generally, as showing in what manner and under what circumstances the maxim, that an assignee succeeds to the rights of his grantor, must, in a large class of cases, be understood. *Absolute* property, according to Mr. Justice *Lawrence*, is, where one having the possession of chattels, has also the exclusive right to enjoy them, which right can only be defeated by some act of his own. *Special* property, on the other hand, is, where he who has the possession holds them subject to the claims of other persons (*x*). According, therefore, as the property in the grantor was absolute or subject to a special lien, so will be that transferred to his assignee—*qui in jus dominiumve alterius succedit jure ejus uti*

(*s*) *Franklin* v. *Neate*, 13 M. & W. 481, cited *Re Attenborough*, 11 Exch. 463. As to the true nature of a pledge, see *per* Parke, B., *Cheesman* v. *Exall*, 6 Exch. 344.

As to the right of the pledgee to sell the pledge, see *Halliday* v. *Holgate*, L. R. 3 Ex. 299. approving *Donald* v. *Suckling*, L. R. 1 Q. B. 585.

(*t*) *Per* Erle, C.J., *Martin* v. *Reid*, 11 C. B. N. S. 734.

(*u*) *Meyerstein* v. *Barber*, L. R. 2 C. P. 51; 36 L. J. C. P. 57; *Young* v. *Lambert*, L. R. 3 C. P. 142; *Ryal* v. *Rolle*, 1 Atk. 164.

(*x*) *Webb* v. *Fox*, 7 T. R. 398. See *per* Pollock, C.B., *Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. & N 506.

debet; and the same principle applies where a subsequent transfer of the property is made by such assignee (*y*).

We shall now proceed to an enumeration of some few other kindred maxims, which are indeed of minor importance, but, nevertheless, could not properly be omitted in even the most cursory notice of the above-mentioned branch of our legal system.

CUICUNQUE ALIQUIS QUID CONCEDIT CONCEDERE VIDETUR ET ID SINE QUO RES IPSA ESSE NON POTUIT (11 *Rep.* 52.)—*Whoever grants a thing is supposed also tacitly to grant that without which the grant itself would be of no effect.*

Rule.—Instances of its application

"If you grant anything, you are presumed to grant to the extent of your power that also without which the thing granted cannot be enjoyed" (*z*). Thus, in *The Caledonian Railway Company* v. *Sprot* (*a*), Lord *Cranworth*, C., in reference to the right to support, observes, "If the owner of a house were to convey the upper story to a purchaser, reserving all below the upper story, such purchaser would, on general principles, have a right to prevent the owner of the lower stories from interfering with the walls and beams upon which the upper story rests, so as to prevent them from affording proper support. The same principle applies to the case of adjacent support,

(*y*) As to a sale or wrongful conversion by bailee for hire, see *Cooper* v. *Willomatt*, 1 C. B. 672; *Bryant* v. *Wardell*, 2 Exch. 479; *Fenn* v. *Bittleston*, 7 Exch. 152; *Spackman* v. *Miller*, 12 C. B. N. S. 659, 676.

(*z*) Judgm., *Lord* v. *Commissioners for City of Sydney*, 12 Moo. P. C. C. 499–500.

(*a*) 2 Macq. Sc. App. Cas. 449, 450, 451. See *Great Western R. C.* v. *Fletcher*, 5 H. & N. 689.

so far, at all events, as to prevent a person who has granted a part of his land from so dealing with that which he retains, as to cause that which he has granted to sink or fall. How far such adjacent support must extend is a question which, in each particular case, will depend on its own special circumstances. * * * And it must further be observed, that all which a grantor can reasonably be considered to grant or warrant, is such a measure of support as is necessary for the land in its condition at the time of the grant, or in the state for the purpose of putting it into which the grant is made. Thus, if I grant a meadow to another, retaining both the minerals under it, and also the adjoining lands, I am bound so to work my mines and to dig my adjoining lands as not to cause the meadow to sink or to fall over. But if I do this, and the grantee thinks fit to build a house on the edge of the land he has acquired, he cannot complain of my workings or diggings, if, by reason of the additional weight he has put on the land, they cause his house to fall. If, indeed, the grant is made expressly to enable the grantee to build his house on the land granted, then there is an implied warranty of support, subjacent and adjacent, as if the house had already existed.

The above reasoning is in conformity with the spirit of the maxim *supra*, p. 445. So it is laid down, that when anything is granted, all the means to attain it (*b*), and all the fruits and effects of it, are granted also, and shall pass inclusive, together with the thing by the grant of the thing itself, without the words *cum perti-*

(*b*) See Dalton's Justice, 397 (ed. 1655); cited, *Evans* v. *Rees*, 12 A. & E. 57, 58; Arg. *Mayor of London* v. *Reg.*, 13 Q. B. 37; *Free Fishers of Whitstable* v. *Gann*, 11 C. B. N. S. 387; S. C., 13 *Id.* 853, 11 H. L. Cas. 192.

nentiis (*c*), or any such-like words (*d*). And a right of way appurtenant to land passes to the tenant by a parol demise of the land, although nothing is said about it at the time of the demise (*e*).

Therefore, by the grant of a piece of ground is granted a right of way to it over the grantor's land, as incident to the grant; and, in like manner, by a reservation of the close is reserved also a right of way to it (*f*); and by the grant of trees is granted power to enter on the land to cut them down and take them away (*g*). If a man leases his land and all mines, where there are no open ones, the lessee may dig for the minerals (*h*); and by the grant of

(*c*) As to the effect of these words, see *Cort* v. *Sagar*, 3 H. & N. 370; Bac. Abr. Grant (T. 4).

(*d*) Shep. Touch. 89; Hobart, 234; Vaugh. R. 109. See, also, *Jinks* v. *Edwards*, 11 Exch. 775, in illustration of the above maxim.

(*e*) *Skull* v. *Glenister*, 16 C. B. N. S. 81.

(*f*) 1 Wms. Saunds. 323, n.; *Pinnington* v. *Galland*, 9 Exch. 1, 12; cited, *per* Parke, B., *Richards* v. *Rose*, *Id.* 220; and distinguished in *White* v. *Bass*, 7 H. & N. 729, 732; *Buckby* v. *Coles*, 5 Taunt. 311; *Robertson* v. *Gantlett*, 16 M. & W. 289.

The mode of creating and nature of a way of necessity were much considered in *Pearson* v. *Spencer*, 1 B. & S. 571.

A right of way of necessity can only arise by grant express or implied; *Proctor* v. *Hodgson*, 10 Exch. 824. See Arg. *Grove* v. *Withers*, 4 Exch. 879.

The right to use a drain may pass impliedly by the grant of a house, *Pyer* v. *Carter*, 1 H. & N. 916 (which "went to the utmost extent of the law," *per* Martin, B., *Dodd* v. *Burchell*, 1 H. & C. 121; cited *Chadwick* v. *Marsden*, L. R. 2 Ex. 289; *Ewart* v. *Cochrane*, 4 Macq. Sc. App. Cas. 117, 122; *Hall* v. *Lund*, 1 H. & C. 676. See *Polden* v. *Bastard*, 32 L. J., Q. B., 372.

(*g*) *Howton* v. *Frearson*, 8 T. R. 56; Noy, Max., 9th ed., 54, 56; Plowd. Com. 16. a.; Finch, Law, 63; *Clarke* v. *Cogge*, Cro. Jac. 170; *Beaudely* v. *Brook*, *Id.* 190; *per* Best, C.J., 2 Bing. 83. See *Robertson* v. *Gantlett*, 16 M. & W. 289.

(*h*) Where minerals are granted by deed, it must *primâ facie* be presumed that the minerals are to be enjoyed, and, therefore, that a power to get them must also be granted or reserved as a necessary incident: *per* Lord Wensleydale, *Rowbotham* v. *Wilson*, 8 H. L. Cas. 360; *per* Martin, B., S. C., 8 E. & B. 149.

fish in a man's pond is granted power to come upon the banks and fish for them (*i*). On the same principle, where trees are excepted in a lease, the lessor has a power by law, as incident to the exception, to enter upon the land demised at all reasonable times in order to fell and carry away the trees; and the like law holds with regard to a demise by parol (*k*). So a rector may enter into a close to carry away the tithes over the usual way, as incident to his right to the tithes (*l*). And a tenant at will, after notice to quit, or any other party who is entitled to emblements, shall have free entry, egress, and regress, to cut and carry them away (*m*). The right to emblements does not, however, give a title to the exclusive occupation of the land. Therefore, it seems, that, if the executors occupy till the corn or other produce be ripe, the landlord may maintain an action for the use and occupation of the land (*n*). On the same principle, where a tenant is entitled to an away-going crop, he may likewise be entitled by custom to retain possession of that portion of the land on which it grows; and, in this case, the custom operates as a prolongation of the term, or rather of the legal right of possession as to such portion (*o*).

So, it has been observed, that when the use of a thing is granted, everything is granted by which the grantee

(*i*) 1 Wms. Saund. 323, n. (6); Shep. Touch. 89; Co. Litt. 59. b.; *Liford's case*, 11 Rep. 52; *Foster* v. *Spooner*, Cro. Eliz. 18; *Saunders' case*, 5 Rep. 12; Noy, Max., 9th ed., p. 56; *Doe* d. *Rogers* v. *Price*, 8 C. B. 894.

(*k*) *Hewitt* v. *Isham*, 7 Exch. 77, 79; *Liford's case*, 11 Rep. 52; *Ashmead* v. *Ranger*, 1 Ld. Raym. 552.

(*l*) 1 Wms. Saund. 323, note (6), *ad finem*.

(*m*) Litt. s. 68; Co. Litt. 56. a., 153. a., cited 1 M. & S. 660.

(*n*) Woodf., L. & T., 12th ed., 722.

(*o*) *Per* Bayley, J., *Boraston* v. *Green*, 16 East, 81; *Griffiths* v. *Puleston*, 13 M. & W. 358; *Ex parte Mandrell*, 2 Madd. 315. See *Strickland* v. *Maxwell*, 2 Cr. & M. 539.

may have and enjoy such use; as, if a man gives me a licence to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter, and dig the land, in order to mend the pipes, though the soil belongs to another, and not to me (*p*).

And where an Act of Parliament empowers a railway company to cross the line of another company by means of a bridge, it was held, that the first-mentioned company, had, consequently, the right of placing temporary scaffolding on the land belonging to the latter, if the so placing it were necessary for the purpose of constructing the bridge (*q*), for *ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest.* And a person lawfully exposing goods for sale in a public market has a right to occupy the soil with baskets necessary and proper for containing the goods (*r*).

In a modern case, it was held, that a certain coal-shoot, water and other pipes, all which were found by special verdict, to be necessary for the convenient and beneficial use and occupation of a certain messuage, did under the particular circumstances pass to the lessee as integral parts of such messuage: and it was further held, in strict accordance with the rule of law now under consideration, that the right of passing and repassing over the soil of a certain passage for the purpose of using the said coal-shoot, and using, cleaning, and repairing the said pipes,

(*p*) *Per* Twysden, J., *Pomfret* v. *Ricroft*, 1 Saund. R. 323; *per* Wigram, *V.-C.*, *Blakesley* v. *Whieldon*, 1 Hare, 180; *per* Story, J., *Charles River Bridge* v. *Warren Bridge*, 11 Peters (U. S.), R. 630, cited *Richmond R. C.* v. *Louisa R. C.*, 13 Howard (U. S.), R. 81; Judgm., *Hodgson* v. *Field*, 7 East, 622, 623.

(*q*) *Clarence R. C.* v. *Great North of England R. C.*, 13 M. & W. 706, 721; S. C., 4 Q. B. 46. See *Doe* v. *Archb. of York*, 14 Q. B. 81.

(*r*) *Townend* v. *Woodruff*, 5 Exch. 506.

likewise passed to the lessee as a necessary incident to the subject-matter actually demised, although not specially named in the lease (*s*).

In a deed of conveyance of certain land, the grantor excepted and reserved out of the grant all coal-mines, together with sufficient way-leave and stay-leave to and from the said mines, and the liberty of sinking pits: the Court held, that, as the coals were excepted, and a right to dig pits for getting those coals reserved, all things "depending on that right, and necessary for the obtaining it," were, according to the above rule, reserved also, and consequently that the owner had, as incident to the liberty to sink pits, the right to fix such machinery as would be necessary to drain the mines, and draw the coals from the pits; and, further, that a pond for the supply of the engine, and likewise the engine-house, were necessary accessories to such an engine, and were, therefore, lawfully made (*t*).

Power of corporation to make bye-laws.

Again, the power of making bye-laws, is on the same principle incident to a corporation; for, when the Crown creates a corporation, it grants to it, by implication, all powers that are necessary for carrying into effect the objects for which it is created, and securing a perpetuity of succession. Now a discretionary power somewhere to make minor regulations, usually called bye-laws, in order to effect the objects of the charter, is necessary; and the reasonable exercise of this power is, therefore, impliedly

(*s*) *Hinchcliffe* v. *Earl of Kinnoul*, 5 Bing., N. C., 1; *Hall* v. *Lund*, 1 H. & C. 676; see *Pheysey* v. *Vicary*, 16 M. & W. 484.

(*t*) *Dand* v. *Kingscote*, 6 M. & W. 174, and cases there cited; *Rogers* v. *Taylor*, 1 H. & N. 706, 711; citing *Dand* v. *Kingscote*, *supra*, and *Earl of Cardigan* v. *Armitage*, 2 B. & C. 197; *Hodgson* v. *Field*, 7 East, 613.

granted by the Crown, and is conferred by the very act of incorporation (*u*). So, a corporation incorporated for trading purposes has impliedly power to contract by parol for purposes necessary for the carrying on of their trade (*x*).

Limitation of rule to necessary incidents.

The above maxim, however, must be understood as applying to such things only as are incident to the grant, and *directly* necessary for the enjoyment of the thing granted: therefore, if a man, as in the instance above put, grants to another the fish in his ponds, the grantee cannot cut the banks to lay the ponds dry, for he may take the fish with nets or other engines (*y*). So, if a man, upon a lease for years, reserve a way for himself through the house of the lessee to a back-house, he cannot use it but at seasonable times, and upon request (*z*). A way of necessity is also limited by the necessity which created it, and, when such necessity ceases, the right of way likewise ceases; therefore, if, at any subsequent period, the party formerly entitled to such way can, by passing over his own land, approach the place to which it led by as direct a course as he would have done by using the old way, the way ceases to exist as of necessity (*a*). A way of necessity

(*u*) *R.* v. *Westwood*, 7 Bing. 20. See *Chilton* v. *London and Croydon R. C.*, 16 M. & W. 212; *Calder and Hebble Nav. Co.* v. *Pilling*, 14 M. & W. 76. A bye-law is "a rule made prospectively and to be applied, whenever the circumstances arise for which it is intended to provide:" Judgm. *Gosling* v. *Veley*, 7 Q. B. 451; Bac. Abr., Corporations (D).

(*x*) Addison on Contracts, 8th ed., p. 90, *et seq.*

(*y*) 1 Wms. Saund. 233, n. (6), *ad finem*; *Lord Darcy* v. *Askwith*, Hob. 234; *per* Parke, B., 6 M. & W. 189.

(*z*) *Tomlin* v. *Fuller*, 1 Ventr. 48. See, also, *Morris* v. *Edgington*, 3 Taunt. 24, cited 6 M. & W. 189; *Wilson* v. *Bagshaw*, 5 Man. & Ry. 448; *Osborn* v. *Wise*, 7 C. & P. 761.

(*a*) *Holmes* v. *Goring*, 2 Bing. 76. As to which case see, *per* Parke, B., *Proctor* v. *Hodgson*, 10 Exch. 828; Judgm., 1 B. & S. 584. See *Grove* v. *Withers*, 4 Exch. 875.

The maxim considered in the text is also applied, *per* Alderson, B., *Breese* v. *Owens*, 6 Exch. 417.

once created, must, however, remain the same way as long as it continues at all (*b*).

General observations.

We may conclude our observations on this part of our subject with the following extract from the work of a very learned writer: "Upon the conveyance of part of an estate a grant of all such rights and easements over the residue retained by the vendor as are essential to the due enjoyment of the part conveyed will, if there be nothing in the conveyance to negative the presumption, be presumed at law; for instance, the grant of . . . drainage or of the right to the continued enjoyment of modern lights on the sale of a house, or of any other continuous easement necessary to the enjoyment of the property; or of the right to that extraordinary support by the adjoining soil which is requisite in order to support the buildings on the part conveyed; and conversely in the absence of anything in the conveyance to negative the presumption, the law will presume a reservation in the conveyance of all such rights and easements over the part conveyed as are essential to the due enjoyment of the part retained by the vendor (*c*).

Authority implied by law.

On a principle similar to that which has been thus briefly considered, it is a rule, that, when the law commands a thing to be done, it authorises the performance of whatever may be necessary for executing its command: *Quando aliquid mandatur, mandatur et omne per quod per venitur ad illud* (*d*). Thus, when a statute gives a

(*b*) *Pearson* v. *Spencer*, 1 B. & S. 571, 584.

(*c*) Dart's Vendors and Purchasers, 5th ed., Vol. 1, 537.

(*d*) 5 Rep. 116.

In accordance with the same principle, an agent is sometimes held to be impliedly clothed with power to act in cases of necessity. See *Edwards* v. *Havill*, 14 C. B. 107; *Beldon* v. *Campbell*, 6 Exch. 886, 889; cited, *per* Sir R. Phillimore, *The Karnak*, L. R. 2 A. & E. 302; S. C., L. R. 2 P. C. 505; *Frost* v.

justice of the peace jurisdiction over an offence, it impliedly gives him power to apprehend any person charged with such offence (*e*). So, constables, whose duty it is to see the peace kept, may, when necessary, command the assistance of others (*f*). In like manner, the sheriff is authorised to take the *posse comitatus*, or power of the county to help him in executing a writ of execution, and every one is bound to assist him when required so to do (*g*) ; and, by analogy, the persons named in a writ of rebellion, and charged with the execution of it, have a right at their discretion, to require the assistance of any of the liege subjects of the Crown to aid in the execution of the writ (*h*).

The foregoing are simple illustrations of the last-mentioned maxim, or of the synonymous expression, *Quando lex aliquid alicui concedit, conceditur et id sine quo res ipsa esse non potest* (*i*), the full import of which has been thus elaborately set forth (*k*) :—"Whenever anything is authorised, and especially if, as matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorised in express terms be also done, then that something else will be

Oliver, 2 E. & B. 301, with which cases compare *Organ* v. *Brodie*, 10 Exch. 449; Story on Agency, 9th ed., pp. 85, 141, 193, 237. The maxim cited *supra* has indeed a very wide applicability in connection with the law of Principal and Agent, see *ex. gr.* *Bayley* v. *Wilkins*, 7 C. B. 886. It was unsuccessfully relied on in *Brady* v. *Todd*, 9 C. B. N. S. 592; with which compare *Miller* v. *Lawton*, 15 C. B. N. S. 834.

(*e*) *Bane* v. *Methuen*, 2 Bing. 63. See *R.* v. *Benn*, 6 T. R. 198.

(*f*) Noy, Max., 9th ed., p. 55.

(*g*) *Foljamb's case*, 5 Rep. 116; cited 4 Bing., N. C., 583; Noy, Max., 9th ed., p. 55; Judgm., *Howden* v. *Standish*, 6 C. B. 521.

(*h*) *Miller* v. *Knox*, 4 Bing., N. C., 574.

(*i*) 12 Rep. 131.

(*k*) *Fenton* v. *Hampton*, 11 Moo., P. C. C., 360.

supplied by necessary intendment. But if, when the maxim comes to be applied adversely to the liberties or interests of others, it be found that no such impossibility exists,—that the power may be legally exercised without the doing that something else, or, even going a step farther, that it is only in some particular instances, as opposed to its general operation, that the law fails in its intention unless the enforcing power be supplied,—then in any such case the soundest rules of construction point to the exclusion of the maxim, and regard the absence of the power which it would supply by implication as a *casus omissus*."

The mode of applying the maxim just cited may be thus exemplified:—

The Lower House of Assembly of the island of Dominica is a legislative assembly constituted under royal proclamation (*l*), and empowered by various commissions given subsequently to the governor for the time being to make with the advice and consent of the Council, laws for the peace, welfare, and good government of the inhabitants of the colony (*m*). The question not long since arose (*n*), has this legislative assembly authority to commit and punish for contempts committed, and for interruptions and obstructions to the business of the said House by its members or others in its presence and during its sittings? In deciding this question adversely to the asserted right, the Judicial Committee of the Privy Council observed in substance as follows:—It must be conceded that as the common law sanctions the exercise of the prerogative by which the Assembly was created,

(*l*) 21st June, A.D. 1775.
(*m*) Clark, Col. L., 134.
(*n*) *Doyle* v. *Falconer*, 4 Moo. P. C. C., N. S. 203; S. C., L. R. 1 P. C. 328.

the principle of the common law, embodied in the maxim, *quando lex aliquid concedit, concedere videtur et illud sine quo res ipsa esse non potest*, applies to the body so created. The question, therefore, is reduced to this: Is the power to punish and commit for contempts committed in its presence, one necessary to the existence of such a body as the Assembly of Dominica and the proper exercise of the functions which it is intended to execute? It is necessary to distinguish between a power to punish for a contempt, which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sitting, which last power is necessary for self-preservation. If a member of a Colonial House or Assembly is guilty of disorderly conduct of the house whilst sitting he may be removed, or excluded for a time, or even expelled; but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing, the right to inflict punishment is another. The former is all that is warranted by the maxim above cited, but the latter is not its legitimate consequence. To establish a right to the particular privilege claimed—it must be shown to be essential to the existence of the Assembly—an incident *sine quo res ipsa esse non potest* (*o*).

Prohibition implied by law

On the other hand, *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud* (*p*)—whatever is prohibited by law to be done directly cannot legally be

(*o*) Judgm., 4 Moo., P. C. C., N. S. 219, 221; *Kielly* v. *Carson*, 4 Moo. P. C. C. 63, overruling *Beaumont* v. *Barrett*, 1 *Id.* 59.

(*p*) 2 Inst. 48.

effected by an indirect and circuitous contrivance (*q*);—a transaction will not be upheld which is "a mere device for carrying into effect that which the legislature has expressly said shall not be done" (*r*); of which maxim the following instances must suffice:—The donee of a power of appointment must exercise the power without any indirect object, and in doing so must act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing any by or sinister object which he may desire to effect (*s*). If a tenant, under covenant not to "let, set, assign, transfer, or make over" the indenture of lease, give a warrant of attorney to confess judgment to a creditor, for the express purpose of enabling such creditor to take the lease in execution under the judgment, this is in fraud of the covenant, and the landlord, under a clause of re-entry in the lease for breach of the condition, may recover the premises in ejectment from a purchaser under the sheriff's sale. In this case, the tenant could not by any assignment, under-lease, or mortgage, have conveyed his interest to a creditor, and, consequently, he cannot convey it by an attempt of this kind. If the lease had been taken by the creditor under an adverse

(*q*) *Booth* v. *The Bank of England*, 7 Cl. & Fin. 509; Judgm., 12 Peters (U. S.), R. 605; Co. Litt. 223. L.; Wing. Max., p. 618; *per* Lord Kenyon, C. J., 8 T. R. 301, 415. See *Hughes* v. *Statham*, 4 B. & C. 187, 193; *Duke of Marlborough* v. *Lord Godolphin*, cited 2 T. R. 251, 252. A court of law will not use a power which it has for the purpose of indirectly exercising a power which it has not: *A.-G.* v. *Bovet*, 15 M. & W. 71. "In actions for the infringement of patent rights, it is of constant recurrence that the gravamen is laid, not as a direct infringement, but as something amounting to a colourable evasion of the right secured to the party:" *per* Tindal, C. J., 7 Cl. & Fin. 546.

(*r*) *Morris* v. *Blackman*, 2 H. & C. 912, 918.

(*s*) *Duke of Portland* v. *Topham*, 11 H. L. Cas. 32, 54.

judgment, the tenant not consenting, it would not have been a forfeiture; but, in the above case, the tenant concurred throughout, and the whole transaction was performed for the very purpose of enabling the tenant to convey his term to the creditor (*t*).

ACCESSORIUM NON DUCIT SED SEQUITUR SUUM PRINCIPALE (*Co. Litt.* 152. *a.*).—*The incident shall pass by the grant of the principal, but not the principal by the grant of the incident* (*u*).

Rule derived from Roman law.

Upon the maxim *Res accessoria sequitur rem principalem* (*x*), depended the important doctrine of *accessio* (*y*) in the Roman law, *accessio* being that particular mode of

(*t*) *Doe* d. *Mitchinson* v. *Carter*, 8 T. R. 300; S. C., *Id.* 57; *Croft* v. *Lumley*, 6 H. L. Cas. 739-40; 27 L. J. Q. B. 321; 5 E. & B. 648, 682, 688; *per* Martin, B., *Price* v. *Worwood*, 4 H. & N. 513. In *Hill* v. *Cowdery*, 1 H. & N. 360, 365, Bramwell, B. citing *Croft* v. *Lumley*, observes, that the doctrine there laid down is, that "when a person covenants that he will not do an act, he does not break his covenant if he does an act which indirectly brings about the result provided against."

(*u*) Co. Litt. 152, a., 151, b.; *per* Vaughan, B., *Harding* v. *Pollock*, 6 Bing. 63.

(*x*) "A principal thing (*res principalis*) is a thing which can subsist by itself, and does not exist for the sake of any other thing. All that belongs to a principal thing, or is in connexion with it, is called an accessory thing (*res accessoria*)." Mackeld. Civ. Law, 155. See *ex. gr. Ashworth* app., *Heyworth* resp., L. R. 4 Q. B. 316, 319.

(*y*) "*Accessio* is the general name given" in the Roman Law "to every accessory thing, whether corporeal or incorporeal, that has been added to a principal thing from without, and has been connected with it, whether by the powers of nature or by the will of man, so that in virtue of this connexion it is regarded as part and parcel of the thing. The *appurtenances* to a thing are to be noticed as a peculiar kind of accession; they are things connected with another thing, with the view of serving for its perpetual use." Mackeld. Rom. Law, 155, 156.

acquisition of property whereby the proprietor of the principal thing became, *ipso jure*, proprietor also of all belonging to the principal as accessory to it. Two extensive classes of cases were accordingly comprised within the operation of the above-mentioned principle: 1st, that in which the proprietor of a thing acquired a right of property in the organic products of the same, as in the young of animals, the fruit and produce of trees, the alluvion or deposit on land, and in some other descriptions of property originating under analogous circumstances. The second class of cases above alluded to comprised those in which one thing becomes so closely connected with and attached to another that their separation cannot be effected at all, or at all events not without injury to one or other of them; and in such cases the owner of the principal thing was held to become proprietor also of the accessory connected therewith (*z*).

Examples of rule in our law.

The above maxim, *Accessorium non ducit sed sequitur suum principale*, is, then, derived from the Roman law, and signifies that the accessory right follows the principal (*a*); it may be illustrated by the remarks appended to the rule immediately preceding (*b*), as also by the following examples:—

An easement to take water from a river to fill a canal ceases when the canal no longer exists (*c*). The owner of land has, *primâ facie*, a right to the title-deeds, as something annexed to his estate in the land, and it is accordingly laid down, that, if a man seised in fee conveys land

(*z*) See Mackeld. Civ. Law, 279, 281; I. 2. 1., *De Rerum Divisione*; Brisson. ad verb. "*Accessiorum.*"

(*a*) Bell, Dict. and Dig. of Scotch Law, p. 7. See, also, Co. Litt. 389, a.

(*b*) See, also, *Chanel* v. *Robotham*, Yelv. 68; *Wood* v. *Bell*, 5 E. & B. 772.

(*c*) *National Guaranteed Manure Co.* v. *Donald*, 4 H. & N. 8.

to another and his heirs, without warranty, all the title-deeds belong to the purchaser, as incident to the land (*d*), though not granted by express words (*e*). In like manner, heir-looms are such goods and chattels as go by special custom to the heir along with the inheritance, and not to the executor or administrator of the last owner of the estate; they are due to the heir by custom, and not by the common law, and he shall accordingly have an action for them. There are also some other things in the nature of heir-looms which likewise descend with the particular title or dignity to which they are appurtenant (*f*).

Again, rent is incident to the reversion, and, therefore, by a general grant of the reversion, the rent will pass; though, by the grant of the rent generally, the reversion will not pass, for *Accessorium non ducit sed sequitur suum principale:* however, by the introduction of special words, the reversion may be granted away, and the rent reserved (*g*). So, an advowson appendant to a manor is so entirely and intimately connected with it, as to pass by the grant of the manor *cum pertinentiis*, without being expressly mentioned or referred to; and, therefore, if a tenant in tail of a manor with an advowson appendant suffered a recovery, it was not necessary for him to make any express mention of his intention to include the advowson in the recovery; for any dealing with the manor, which is the principal, operates on the advowson, which is the accessory, whether expressly named or not. It is, however, to be observed that, although the convey-

Advowson appendant.

(*d*) See *per* Tindal, C. J., *Tinniswood* v. *Pattison*, 3 C. B. 248, *et vide*, *Id.* n. (b.)

(*e*) *Lord Buckhurst's case*, 1 Rep. 1; *Goode* v. *Burton*, 1 Exch. 189, 193, *et seq*; *Allwood* v. *Heywood*, 32 L. J., Ex., 153.

(*f*) See 1 Crabb, Real Prop. 11, 12.

(*g*) 2 Com. by Broom & Hadley, 339; Litt. s. 229; Co. Litt. 143, a.

ance of the manor *primâ facie* draws after it the advowson also, yet it is always competent for the owner to sever the advowson from the manor, either by conveying the advowson away from the manor, or by conveying the manor without the advowson (*h*); and hence there is a marked distinction between the preceding cases and those in which the incident is held to be inseparably connected with the principal, so that it cannot be severed therefrom. Thus, it is laid down that estovers, or wood granted to be used as fuel in a particular house, shall go to him that hath the house; and that, inasmuch as a court baron is incident to a manor, the manor cannot be granted and the court reserved (*i*). In some cases, also, that which is parcel or of the essence of a thing passes by the grant of the thing itself, although at the time of the grant it were actually severed from it; by the grant, therefore, of a mill, the mill-stone will pass, although severed from the mill (*k*).

Severance from grant.

Common appendant, &c.

Again, common of pasture *appendant* is the privilege belonging to the owners or occupiers of arable land holden of a manor, to put upon the wastes of the manor their horses, cattle, or sheep; it is appendant to the particular farm, and passes with it, as incident to the grant (*l*). But divers things which, though continually enjoyed with other things, are only appendant thereto, do not pass by a grant of those things; as, if a man has a warren in his

(*h*) Judgm., *Moseley* v. *Motteux*, 10 M. & W. 544; Bac. Abr., "*Grants*" (I. 4).

(*i*) Finch, Law, 15.

(*k*) Shep. Touch. 90. See *Wyld* v. *Pickford*, 8 M. & W. 443. As to what shall be deemed to pass as appendant, appurtenant, or incident, see Bac. Abr., "*Grants*" (I. 4). *Smith* v. *Ridgeway*, 4 H. & C. 37, 577; *Langley* v. *Hammond*, L. R. 3 Ex. 161; 37 L. J. Ex. 118.

(*l*) Shep. Touch. 89, 240; Bac. Abr., "*Grants*" (I. 4); Co. Litt., by Thomas, vol. i. p. 227.

land, and grants or demises the land, by this the warren does not pass, unless, indeed, he grants or demises the land *cum pertinentiis*, or with all the profits, privileges, &c., thereunto belonging, in which case the warren might, perhaps, pass (*m*).

In *Ewart* v. *Cochrane* (*n*), it was stated to be the law of England that when two properties are possessed by the same owner, and there has been a severance made of one part from the other, anything which was used and was necessary for the comfortable enjoyment of that part of the property which is granted, shall be considered to follow from the grant if there are the usual words in the conveyance.

Another well-known application of the maxim under consideration is to covenants running with the land, which pass therewith, and on which the assignee of the lessee, or the heir or devisee of the covenantor, is in many cases liable, according to the kindred maxim of law, *transit terra cum onere* (*o*); a maxim, the principle of which holds not merely with reference to covenants, but likewise with reference to such customs as are annexed to land—for instance, it is laid down that the custom of gavelkind, being a custom by reason of the land, runs therewith, and is not affected by a fine or recovery had of the land; but "otherwise it is of lands in ancient demesne partible among the males, for there the custom runneth not with the land simply, but by

(*m*) Shep. Touch. 89; 1 Crabb, Real. Prop. 488. See *Pannell* v. *Mill*, 3 C. B. 625; *Graham* v. *Ewart*, 1 H. & N. 550; S. C., 11 Exch. 320; cited in *Jeffryes* v. *Evans*, 19 C. B. N. S. 266; *Earl of Lonsdale* v. *Rigg*, 11 Exch. 654; S. C., 1 H. & N. 923.

(*n*) 4 Macq. 122; *Francis* v. *Hayward*, 20 Ch. Div. 773; 52 L. J. Ch. 12.

(*o*) Co. Litt. 231, a.

reason of the ancient demesne: and, therefore, because the nature of the land is changed, by the fine or recovery, from ancient demesne to land at the common law, the custom of parting it among the males is also gone" (*p*).

Application of rule to titles.

With reference to titles, moreover, one of the leading rules is, *cessante statu primitivo cessat derivativus* (*q*)—the derived estate ceases on the determination of the original estate; and the exceptions to this rule have been said to create some of the many difficulties which present themselves in the investigation of titles (*r*). The rule itself may be illustrated by the ordinary case of a demise for years by a tenant for life, or by any person having a particular or defeasible estate, which, unless confirmed by the remainderman or reversioner, will determine on the death of the lessor; and the same principle applies whenever the original estate determines according to the express terms or nature of its limitation, or is defeated by a condition in consequence of the act of the party as by the marriage of a tenant *durante viduitate*, or by the resignation of the parson who has leased the glebe lands or tithes belonging to the living (*s*).

An exception to the foregoing rule arises in cases of copyholds, where the tenant has granted a lease to another with the license of the lord, and then commits a forfeiture, here the license operates as a confirmation by the lord of the term thus created, and, therefore, pending

(*p*) Finch, Law, 1, 16.

(*q*) 8 Rep. 34.

(*r*) 1 Prest., Abs. Tit. 245.

The maxim *supra* "applies only when the original estate determines by limitation or is defeated by a condition. It does not apply when the owner of the estate does any act which amounts to an alienation or transfer, though such alienation or transfer produces an extinguishment of the original estate." Shep. Touch. by Preston, 286. See *London, &c., Loan* Co. v. *Drake*, 6 C. B. N. S. 798, 810.

(*s*) 1 Prest. Abs. Tit. 197, 317, 358, 359.

the term, the lord cannot maintain ejectment for the land (*t*).

Mercantile transactions.

The law relative to contracts and mercantile transactions likewise presents many examples of the rule that the accessory follows and cannot exist without its principal; thus, where framed pictures are sent by a carrier, the frames, as well as the pictures, are within the Carriers' Act (11 Geo. 4 & 1 Will. 4, c. 68, s. 1) (*u*). Again, the obligation of the surety is accessory to that of the principal, and is extinguished by the release or discharge of the latter, for *quum principalis causa non consistit ne ea quidem quæ sequuntur locum habent* (*x*), and *quæ accessionum locum obtinent extinguuntur cum principales res peremptæ fuerint* (*y*). The converse, however, of the case just instanced does not hold, and the reason is that *accessorium non trahit principale* (*z*).

Principal and interest.

So, likewise, interest of money is accessory to the principal, and must, in legal language, "follow its nature" (*a*); and, therefore, if the plaintiff in any action is barred from recovering the principal, he must be equally barred from recovering the interest (*b*). And, "If by a will the whole of the personal estate, or the residue of the personal

(*t*) *Clarke* v. *Arden*, 16 C. B. 227.

(*u*) *Henderson* v. *London and North-Western R. C.*, L. R. 5 Ex. 90; 39 L. J. Ex. 55; distinguishing *Treadwin* v. *Great Eastern R. C.*, L. R. 3 C. P. 308.

(*x*) D. 50. 17. 129, § 1; 1 Pothier, Oblig., 413.

(*y*) 2 Pothier, Oblig., 202.

(*z*) 1 Pothier, Oblig., 477; 2 *Id.* 147, 202.

(*a*) 3 Inst. 139; Finch, Law, 23.

(*b*) Judgm., *Clarke* v. *Alexander*, 8 Scott, N. R. 165. See *per* Lord Ellenborough, C. J., 3 M. & S. 10; 2 Pothier, Oblig., 479. "The giving of interest is not by way of a penalty, but is merely doing the plaintiff full justice, by having his debt with all the advantages properly belonging to it. It is in truth a compensation for delay." Judgm., 16 M. & W. 144.

See *Hollis* v. *Palmer*, 2 Bing. N. C. 713; *Florence* v. *Drayson*, 1 C. B. N. S. 584; *Florence* v. *Jennings*, 2 *Id.* 454; *Forbes* v. *Forbes*, 18 Beav. 552.

estate, be the subject of an executory bequest, the income of such personal estate follows the principal as an accessory, and must, during the period which the law allows for accumulation be accumulated and added to the principal (*c*); and where certain stock to which the assignor was entitled in reversion upon the death of his mother was assigned with all his right, title, and interest thereon, it was held that the bonuses which accrued during his mother's life, subsequently to the assignment, passed under it (*d*).

Freight follows ownership of vessel.

The title to freight is *primâ facie* an incident of ownership, and, if a sale or transfer of shares be effected, while the ship is under a contract of affreightment, without the mention of the word freight, that will pass the corresponding share in the freight to the purchaser, notwithstanding a subsequent contract of the vendor to transfer this particular freight to another (*e*).

LICET DISPOSITIO DE INTERESSE FUTURO SIT INUTILIS TAMEN FIERI POTEST DECLARATIO PRÆCEDENS QUÆ SORTIATUR EFFECTUM INTERVENIENTE NOVO ACTU. (*Bac. Max., reg.* 14.)—*Although the grant of a future interest is invalid, yet a declaration precedent may be made which will take effect on the intervention of some new act.*

Rule laid down by Lord Bacon.

"The law," says Lord *Bacon*, "doth not allow of grants except there be a foundation of an interest in the

(*c*) *Per* Lord Westbury, C., *Bective* v. *Hodgson*, 10 H. L. Cas. 665.

(*d*) *Re Armstrong's Trusts*, 3 K. & J. 486; *Cooper* v. *Woolfitt*, 2 H. & N. 122.

(*e*) *Lindsay* v. *Gibbs*, 22 Beav. 522; see also *Rusden* v. *Pope*, L. R. 3 Ex. 276; 37 L. J. Ex. 137.

grantor; for the law that will not accept of grants of titles, or of things in action which are imperfect interests, much less will it allow a man to grant or incumber that which is no interest at all, but merely future. But of declarations precedent, before any interest vested, the law doth allow, but with this difference, so that there be some new act or conveyance to give life and vigour to the declaration precedent (*f*).

With respect to the first part of the above rule, viz., that a disposition of after-acquired property is altogether inoperative, it has been observed (*g*) that Lord *Bacon* assumes this as a proposition of law which is to be considered as beyond dispute, and accordingly we find the same general rule laid down by all the older writers of authority. "It is," says *Perkins* (*h*), "a common learning in the law, that a man cannot grant or charge that which he hath not." And again, it has been said, that if a man grants unto me all the wool of his sheep, meaning thereby the wool of sheep which the grantor at that time has, the grant is good (*i*); but that a man could not grant all the wool which should grow upon his sheep that he should buy hereafter (*k*). Such formerly was the rule at common law, but the rule in equity was different, and is now good

(*f*) Bac. Max., reg. 14.

(*g*) Judgm., 1 C. B. 386.

(*h*) Tit., "*Grants*," s. 65. See, also, Vin. Abr., "*Grants*" (H. 6); Noy, Max., 9th ed., 162; Com. Dig., "*Grant*" (D).

(*i*) Perkins, tit. "*Grants*," s. 90.

(*k*) *Grantham* v. *Hawley*, Hob. 132. See Shep. Touch., by Preston, 241.

In *Webster* v. *Power*, L. R. 2 P. C. 69, a mortgage of a certain number of branded sheep and herds of cattle, on a run in the colony of New South Wales, with the issue, increase, and produce thereof, was held limited to the issue and increase of the specific sheep, and not to include sheep afterwards brought upon the run, though in substitution for those specified in the original mortgage.

law in all the Courts, namely, that a contract which engages to transfer to a purchaser or mortgagee property of which the vendor or mortgagor is not possessed at the time, transfers the interest immediately on the property being acquired by him, provided the contract itself purports to convey the interest in the property, and is not a mere licence to seize (*l*).

Assignment by will.

Property to which the testator has become entitled subsequently to the execution of a will, will pass under it (*m*); a will is an instrument of a peculiar nature, being ambulatory and revocable during the life of the testator, and speaking only at his death, unless an intention to the contrary is clearly manifested (*n*), according to the maxims, *Ambulatoria enim est voluntas defuncti usque ad vitæ supremum exitum* (*o*), and *Omne testamentum morte consummatum est* (*p*).

(*l*) *Holroyd* v. *Marshall*, 10 H. L. C. 191; 33 L. J. Ch. 193; *Reeve* v. *Whitmore*, 4 De G. J. & S. 1; 33 L. J. Ch. 63.

(*m*) 1 Vict. c. 26, s. 3. See, *per* Lord Mansfield, C. J., 1 Cowp. 305, 306; *Norris* v. *Norris*, 2 Coll. 719; *Jepson* v. *Key*, 2 H. & C. 873. In *Doe* d. *Cross* v. *Cross*, 8 Q. B. 714, a point arose as to whether an instrument operated as a gift *inter vivos* or by way of devise. In regard to gifts *inter vivos*, see *Bourne* v. *Fosbrooke*, 18 C. B. N. S. 515; *Shower* v. *Pilck*, 4 Exch. 473; *Flory* v. *Denny*, 7 Exch. 581; cited *per* Williams, J., *Maugham* v. *Sharpe*, 17 C. B. N. S. 464; *per* Parke, B., *Oulds* v. *Harrison*, 10 Exch. 575; *Milnes* v. *Dawson*, 5 Exch. 950.

(*n*) 1 Vict. c. 26, s. 24; *O'Toole* v. *Browne*, 3 E. & B. 572; *per* Sir J. Leach, M. R., *Gittings* v. *M'Dermott*, 2 My. & K. 73. See, *per* Lord Brougham, C., 1 My. & K. 485.

(*o*) D. 34. 4. 4.; 4 Rep. 61. "Delivery" of a will implies "something whereby the party acknowledges that the instrument is a complete act containing his final mind—that it is no longer ambulatory;" *per* Parke, B., *Curteis* v. *Kenrick*, 3 M. & W. 471; *et vide per* Lord Abinger, C. B., *Id.* 472; *Vincent* v. *Bishop of Sodor and Man*, 8 C. B. 905, 933.

As bearing on the finality of a testamentary instrument, see *Doe* d. *Strickland* v. *Strickland*, 8 C. B. 724; *Plenty* v. *West*, 6 C. B. 201; *Andrew* v. *Motley*, 12 C. B. N. S. 514.

(*p*) Co. Litt. 322, b.

It may be gathered from the preceding remarks that since the application of rules of equity to the common law effected by the Judicature Act of 1873, the maxim laid down by Lord *Bacon* has ceased to be of much, if any, practical importance.

CHAPTER VII.

RULES RELATING TO MARRIAGE AND DESCENT.

It has been thought convenient to insert a selection of rules relating to Marriage and Descent immediately after those which concern the legal rights and liabilities attaching to property in general. For additional information on the subjects treated of in this Chapter, the authorities and references below given may with advantage be consulted (*a*).

CONSENSUS, NON CONCUBITUS, FACIT MATRIMONIUM. (*Co. Litt.* 33 *a.*)—*It is the consent of the parties, not their concubinage, which constitutes a valid marriage* (*b*).

Marriage, how constituted.

Marriage is constituted by the *conjunctio animorum*,

(*a*) 2 Com. by Broom & Hadley, Vol. 1, Chap. XV., which treats of Husband and Wife; the Law of Husband and Wife by Montagu Lush; the important judgments delivered in *Reg.* v. *Millis*, 10 Cl. & Fin. 534; *Beamish* v. *Beamish*, 9 H. L. Cas. 274; *Brook* v. *Brook*, *Id.* 193; *Dolphin* v. *Robins*, 7 H. L. Cas. 390; *Shaw* v. *Gould*, L. R. 3 H. L. 55, 79; *Fenton* v. *Livingstone*, 3 Macq. Sc. App. Cas. 497; *Yelverton* v. *Longworth*, 4 *Id.* 743; *Reg.* v. *Inhabs. of Brighton*, 1 B. & S. 447; *Hall* v. *Wright*, E. B. & E. 746, which contain learned researches respecting the nature and requisites of the marriage contract; Cruise, Dig., 4th ed., vol. 3, tit. 29, chaps. 1, 2, 3, which treat of Descent and Consanguinity; and the elaborate judgment of Kindersley, V.-C., respecting the operation of the stat. 3 & 4 Will. 4, c. 106, in *Re Don's Estate*, 4 Drew. 194.

(*b*) As to this maxim, see *per* Lord

or *present* consent of the parties expressed under such circumstances as by law required, so that, though they should, after consent so given, by death or disagreement or any other cause, happen not to consummate the marriage *conjunctione corporum*, they are, nevertheless, entitled to all the legal rights consequent thereon (*c*).

The above maxim has been adopted from the civil law (*d*) by the common lawyers, who, indeed, have borrowed (especially in ancient times) almost all their notions of the legitimacy of marriage from the canon and civil laws (*e*); and, by the latter, as well as by the earlier ecclesiastical law, marriage was a mere *consensual* contract, only differing from other contracts of this class in being indissoluble even by the consent of the contracting parties. It was always deemed to be "a contract executed without any part performance;" so that the maxim was undisputed and peremptory, *Consensus, non concubitus, facit nuptias vel matrimonium* (*f*).

Verba de præsenti.

By the law of England (*g*), also, marriage is considered

Campbell, C., 9 H. L. Cas. 335; as to its applicability in relation to the Scotch law of marriage, see *Yelverton* v. *Longworth*, 4 Macq. Sc. App. Cas. 743, 856, 861.

(*c*) See Bell, Dict. & Dig. of Scotch Law, p. 217. See *Field's Marriage Annulling Bill*, 2 H. L. Cas. 48.

(*d*) *Nuptias non concubitus sed consensus facit*, D. 50. 17. 30.

(*e*) 1 Com. by Broom & Hadley, 524; Co. Litt. 33. a. See 2 Voet. Com. Pandect., lib. 23, tit. 2.

(*f*) *Per* Lord Brougham, in *Reg.* v. *Millis*, 10 Cl. & Fin. 719. See also Lord Stowell's celebrated judgment in *Dalrymple* v. *Dalrymple* (by Dodson), p. 10 (a), where many authorities respecting this maxim are collected. See, also, the remarks upon this case, 10 Cl. & Fin. 679; and, *per* Cresswell, J., *Brook* v. *Brook*, 27 L. J., Chanc. 401; S. C., 9 H. L. Cas. 193. *Field's Marriage Annulling Bill*, *supra*, well illustrates the maxim cited in the text.

(*g*) The following authorities may be referred to, as explanatory of the law of Scotland respecting marriages *per verba de præsenti*; *Yelverton* v. *Longworth*, 4 Macq. Sc. App. Cas. 743; *Dalrymple* v. *Dalrymple*, 2 Hagg. Cons. R. 54; *Hamilton* v. *Hamilton*, 9 Cl. & Fin. 327; *Stewart*

in the light of a contract, and therefore the ordinary principles which attach to contracts in general are, with some exceptions, applied to it. The principle expressed in the above maxim, and which alone we propose to consider, is, that, in order to render a marriage valid, the parties must be willing to contract. The weight of authority, indeed, seems to show that, even prior to the Marriage Acts (*h*), a present and perfect consent, that is, a consent expressed *per verba de præsenti*, was sufficient to render a contract of marriage indissoluble between the parties themselves, and to afford to either of them, by application to the spiritual court, the power of compelling the solemnisation of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders (*i*).

Reg. v. *Millis.*

In *Reg.* v. *Millis* (*j*), the facts were these:—A. and B. entered into a present contract of marriage *per verba de præsenti* in Ireland, in the house and in the presence of a placed and regular Presbyterian minister. A. was a member of the Established Church; B. was either a

v. *Menzies*, 8 *Id.* 309; *Bell* v. *Graham*, 13 Moo. P. P. C. 242; Shelf. on Marriage and Div. 91.

(*h*) 4 Geo. 4, c. 76.

(*i*) *Per* Tindal, C.J., delivering the opinion of the judges in *Reg.* v. *Millis*, 10 Cl. & Fin. 655; *Catherwood* v. *Caslon*, 13 M. & W. 261; *Beamish* v. *Beamish*, 9 H. L. Cas. 274.

There is a strong legal presumption in favour of marriage, *Piers* v. *Piers*, 2 H. L. Cas. 331; *Reg.* v. *Manwaring*, Dearsl. 3 B. 132. In *Shedden* v. *Patrick*, L. R. 1 Sc. App. Cas. 470, the presumption of a marriage prior to the birth of children arising from cohabitation and acknowledgment was held to be completely rebutted by evidence of the strongest kind.

(*j*) 10 Cl. & Fin. 534 (as to which case, see the observations of Lord Campbell, C., 9 H. L. Cas. 338–9; of Dr. Lushington, *Catterall* v. *Catterall*, 1 Robertson, 582; *per* Willes, J., *Reg.* v. *Manwaring*, Dearsl. & B. 139); *Beamish* v. *Beamish*, 9 H. L. Cas. 274.

member of the Established Church, or a Protestant dissenter. A religious ceremony of marriage was performed on the occasion by the said minister between the parties according to the usual form of the Presbyterian Church in Ireland. A. and B. after the contract and ceremony, cohabited and lived together for two years as man and wife. A. afterwards, and whilst B. was living, married C. in England. It was held, that A. was not indictable for bigamy.

Beamish v. Beamish.

Where, prior to the stat. 7 & 8 Vict. c. 81, a clergyman of the Church of England, being in holy orders, performed a ceremony of marriage between himself and a certain woman, by reading the form of solemnisation of matrimony as set forth in the Book of Common Prayer, without witnesses, other than one who happened to see what was passing from an adjoining yard: the marriage having been consummated, was held, by the House of Lords, conformably to the *ratio decidendi* in *Reg.* v. *Millis*, to have been invalid (*k*).

Yelverton v Longworth.

In *Yelverton* v. *Longworth* (*l*), a marriage celebrated in Ireland by a Roman Catholic priest between a Roman Catholic lady and a gentleman of a Protestant family who had been brought up a Protestant, and who at the ceremony declared himself a "Protestant Catholic," was held *per* Lords *Wensleydale* and *Chelmsford* to be void under the Irish Act, 19 Geo. 2, c. 13, s. 1.

In *Reg.* v. *Millis* above abstracted, are to be found the following remarks apposite to the principal maxim under our notice, and deserving of perusal:—

Remarks of Tindal, C.J.,

"It will appear, no doubt, says *Tindal*, C. J., deliver-

(*k*) *Beamish* v. *Beamish*, 9 H. L. Cas. 274.

(*l*) 4 Macq. Sc. App. Cas. 743, 746, 862, 893.

In *Reg.* v. *Millis*, respecting a marriage valid at common law.

ing the opinion of the judges in the case just cited, "upon referring to the different authorities, that at various periods of our history there have been decisions as to the nature and description of the religious ceremonies necessary for the completion of a perfect marriage, which cannot be reconciled together; but there will be found no authority to contravene the general position, that, at all times, by the common law of England, it was essential to the constitution of a full and complete marriage, that there must be some religious solemnity; that both modes of obligation should exist together, the civil and religious; that, besides the civil contract, that is, the contract *per verba de præsenti*, which has always remained the same, there has at all times been also *a religious ceremony*, which has not always remained the same, but has varied from time to time, according to the variation of the laws of the Church; with respect to which ceremony, it is to be observed, that, whatever at any time has been held by the law of the Church to be a sufficient religious ceremony of marriage, the same has at all times satisfied the common law of England in that respect." Where, for instance, the Church has held, as it often has done, down to the time of passing the Marriage Act, that a marriage celebrated by a minister in holy orders, but not in a church, or by such minister in a church, but without publication of banns, and without licence, is irregular, and renders the parties liable to ecclesiastical censures, but is sufficient, nevertheless, to constitute the religious part of the obligation, and that the marriage is valid notwithstanding such irregularity; the law of the land has followed the spiritual court in that respect, and held such marriage to be valid. "But it will not be found in any period of our history, either that the Church of England has held the religious cele-

bration sufficient to constitute a valid marriage, unless it was performed in the presence of an ordained minister, or that the common law has held a marriage complete without such celebration" (*m*).

In support of the position thus laid down, the learned Chief Justice, whose words we have above quoted, refers to the state of the law relative to the validity of marriages of Quakers and Jews, both prior and subsequent to the Marriage Act. Since the passing of this Act, he observes, it has generally been supposed that the exception contained therein, as to the marriages of Quakers and Jews, amounted to a tacit acknowledgment by the legislature, that a marriage solemnised with the religious ceremonies which they were respectively known to adopt ought to be considered sufficient; but before the passing of that Act, when the question was left perfectly open, we find no case in which it has been held that a marriage between Quakers was a legal marriage, on the ground that it was a marriage by a contract *per verba de præsenti*, but, on the contrary, the inference is strong that it was never considered legal. As to the case of the Jews, he subsequently proceeds to remark: it is well-known, that, in early times, they stood in a very peculiar and excepted condition. For many centuries they were treated not as natural-born subjects, but as foreigners, and scarcely recognised as participating in the civil rights of other subjects of the Crown. The ceremony of marriage by their own peculiar forms might, therefore, be regarded as constituting a legal marriage, without affording any argument as to the nature of a contract of marriage, *per verba de præsenti*, between other subjects (*n*).

(*m*) 10 Cl. & Fin. 655, 656. (*n*) 10 Cl. & Fin. 671, 673.

6 & 7 Will. 4, c. 85.

The preceding remarks, with reference to the requisites at common law of the marriage contract (*o*), must, of course, be understood as subject to restriction by the various enactments which have from time to time been passed by the Legislature with reference to this subject. Without entering at length into their provisions, we may observe that the stat. 6 & 7 Will. 4, c. 85, recognises marriage as essentially a civil contract; and by the 20th section enacts, that marriages may be solemnised in places registered for the purpose in the presence of a registrar and two witnesses, and, subject to certain provisoes, according to such form and ceremony as the parties may see fit to adopt. By the 21st section it is further provided, that persons who shall object to marry under the provisions of the Act in any registered building may, after due notice and certificate issued, contract and solemnise marriage at the office of the superintendent registrar in the manner therein pointed out (*p*).

Verba de futuro.

Having thus observed that marriage is a contract entered into by consent of the parties, and with certain forms, either of a purely civil or of a religious nature, prescribed and sanctioned by the law, it is important further to remark the difference which exists between a contract of marriage *per verba de præsenti* and a contract *per verba de futuro;* for the latter does not, under any circumstances, constitute a marriage by our law; it only gives a right of action for damages in case of its violation, though mutual consent will relieve the parties from their engagement (*q*); and this, like most other contracts, is

(*o*) See Shelf. Marriage, Index, "*Statutes.*"

(*p*) See also 19 & 20 Vict. c. 119.

(*q*) *Per* Lord Lyndhurst, C., 10 Cl. & Fin. 837. As to a plea of exoneration and the evidence necessary to support it, see particularly *King* v. *Gillett*, 7 M. & W. 55, 59.

voidable, unless the party making the promise be of the full age required by law, viz., twenty-one; so that, if there are mutual promises to marry between two persons, one of whom has attained the age of twenty-one, and the other of whom is within that age, the first is so far bound by the contract as to be liable to an action, if it be broken (*r*); but the latter may avoid it, if he pleases (*s*); and this distinction is founded on the well-known principle, that, where a contract may be to the benefit of an infant, or to his prejudice, the law so far protects him as to give him an opportunity of reconsidering it when he comes of age, and it is good or voidable at his election (*t*).

Want of age.

Not only moreover is want of age sufficient to avoid a contract of marriage to take place *in futuro*, but, in some cases, it renders void, or rather voidable, the actual ceremony, by reason of the presumed imbecility of judgment in the parties contracting, and their consequent inability to consent. Therefore, if a boy under fourteen, or a girl under twelve years of age, marries, this marriage is only inchoate and imperfect; and, when either of them comes to full age, that party may disagree, and declare the marriage void, without any divorce or sentence in the spiritual court; and this is founded on the civil law; whereas the canon law pays greater regard to the constitution than the age of the parties, and, if they are *habiles ad matrimonium*, the marriage is good, whatever be their respective ages; and in our law the marriage will be good to this extent, that, if at the age of consent they agree to continue together, they need not be married again. If, moreover, the husband be of years of discre-

(*r*) *Per* Lord Ellenborough, C.J., *Warwick* v. *Bruce*, 2 M. & S. 209; S. C., affirmed in error, 6 Taunt. 118; *Holt* v. *Ward*, 2 Stra. 937.

(*s*) Judgm., 2 Stra. 939.

(*t*) *Ib.*

tion, and the wife under twelve, when she comes to years of discretion he may disagree as well as she, for in contracts the obligation must be mutual; both must be bound, or neither; and so it is, *vice versâ*, when the wife is of years of discretion, and the husband under (*u*).

Consent of other parties.

Again, by the common law, if the parties themselves were of the age of consent, the concurrence of no other party was necessary in order to make the marriage valid, and this was agreeable to the canon law. Where, however, one of the contracting parties is under age, the law is now regulated by the stat. 4 Geo. 4, c. 76, which enacts, (sect. 8), that, from and after the 1st of November, 1823, no parson shall be punishable by ecclesiastical censures for solemnising a marriage without the consent of parents or guardians between persons, both or one of whom shall be under twenty-one, after banns published, unless such parson shall have notice of the dissent of such parents or guardians. And if such parents or guardians shall openly declare their dissent at the time of publication, such publication shall be void. And by sect. 14, where either of the parties (not being a widower or widow) shall be under the age of twenty-one, it is required (*x*), that one of the parties shall personally swear that the consent of those persons whose consent is necessary has been obtained. By sect. 16, the father, if living, of any party under twenty-one, not being a widow or widower, or, if the father be dead, the guardian of the person of the party so under age, and if no guardian, then the mother if unmarried, and, if married, the guardian appointed by the Court of Chancery, shall have authority to give con-

(*u*) 1 Com. by Broom & Hadley, 526, 527.

(*x*) See also 6 & 7 Will. 4, c. 85, s. 12; 19 & 20 Vict. c. 119, ss. 2, 17, 18.

sent to the marriage of such party; and, by sect. 17, if the father shall be *non compos*, or the guardian or mother shall be *non compos*, or in parts beyond seas, or shall unreasonably withhold consent, application may be made to the Court of Chancery, by petition, in a summary way; and if the marriage shall appear to be proper, it shall be so declared. It has, moreover, been held, that the language of the 17th section only goes to require consent, and the marriage is not absolutely void if solemnised without it (*y*).

Further, by 6 & 7 Will. 4, c. 85 (*z*), (amended by 1 Vict. c. 22, 3 & 4 Vict. c. 72, and 19 & 20 Vict. c. 119), the like consent is required to any marriage in England solemnised by license, as would have been required by law in a case of marriage solemnised by license immediately before the passing of the Act; and every person whose consent to a marriage by license is required by law, is thereby authorised to forbid the issue of the superintendent registrar's certificate, whether the marriage is intended to be with license or without.

Royal Marriage Act.

In connection with this branch of the subject, viz., as to the consent of other than the contracting parties to the marriage, we may observe that, by the Royal Marriage Act (12 Geo. 3, c. 11), no descendant of the body of King George II. (other than the issue of princesses married into foreign families) is capable of contracting matrimony without the previous consent of the sovereign, signified under the great seal, and any marriage contracted without such consent is void; provided, that such of the said descendants as are above the age of twenty-five, may, after a twelvemonth's notice given to the Privy

(*y*) *R.* v. *Birmingham*, 8 B. & C. 35. (*z*) Sect. 10.

Council, contract and solemnise marriage without the consent of the Crown, unless both Houses of Parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage. In order to bring a marriage within the prohibition of this statute, it is not necessary that it should have been contracted within the realm of England; but the statute extends to prohibit and to annul marriages wherever the same be contracted or solemnised, either within the realm of England or without (*a*).

Non compos mentis.

The rule, that *consensus facit matrimonium* is also applicable to cases in which either party, at the date of the marriage, is labouring under mental incapacity: for, without a competent share of reason, neither this nor any other express contract can be valid, for consent is absolutely requisite to matrimony, and persons *non compotes mentis* are incapable of consenting to anything (*b*).

The validity of a marriage celebrated between two persons in a place other than that of their domicile seems to be regulated by the *lex loci domicilii*, and not by the law of the place where the parties are married. Thus in *Brook* v. *Brook* (*c*) (followed in the recent case of *Sottomayer* v. *De Barros* (*d*)) the facts were as follows:—A. and C. were both British subjects domiciled in England. A. had previously intermarried with B., who died, leaving a sister named C. A. and C., after B.'s death, went to Denmark, and were there duly married

(*a*) *The Sussex Peerage*, 11 Cl. & Fin. 85; and see the opinion of Cresswell, J., in *Brook* v. *Brook*, 27 L. J., Chanc. 401; S. C., 9 H. L. Cas. 193; in connection with which case see also *Reg.* v. *Chadwick*, 11 Q. B. 173.

(*b*) 1 Com. by Broom & Hadley, 527; L. R. 1 P. & D. 335.

(*c*) 9 H. L. Cas. 193.

(*d*) 3 P. D. 1; 47 L. J. P. & D. 23.

according to the laws of Denmark, by which a man may marry his deceased wife's sister. It was held that under the provisions of 5 & 6 Will. 4, prohibiting marriage with a deceased wife's sister, the marriage in Denmark was void. The Lord Chancellor (Lord *Campbell*), after stating the general rule to be that a foreign marriage, valid according to the law of a country where it is celebrated is good everywhere, laid it down that while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus* (the law of the country in which it is celebrated) the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. This decision was followed by the Court of Appeal in *Sottomayer* v. *De Barros*, where, the marriage having been solemnised in England, the judgment proceeded upon the assumption that both the contracting parties were domiciled in Portugal, in which country marriage between first cousins is prohibited. The Lord Justice *James*, in delivering judgment, thus states the law: "The law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage . . . . this renders invalid a marriage between persons both at the time of their marriage subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnised."

It subsequently was shown that one of the parties, although a Portuguese, was domiciled in England at the time the marriage was solemnised, and as the rule *nisi* for dissolution of the marriage had not been made absolute, the mother came again before the Court, when it was decided by Sir *James Hannen*, the President of the Probate Division, that where a marriage is celebrated between two persons, one of whom is domiciled in the country where the marriage is solemnised, and the other is not, the contract is to be governed by the laws of the country where the marriage is solemnised (*e*).

HÆRES LEGITIMUS EST QUEM NUPTIÆ DEMONSTRANT. (Co. *Litt.*, 7 *b.*)—*The common law takes him only to be a son whom the marriage proves to be so* (*f*).

Legal meaning of word "heir."

The word "heir" (*g*), in legal understanding, signifies him to whom lands, tenements, or hereditaments, by the act of God and right of blood, descend, of some estate of inheritance, for *Deus solus hæredem facere potest non*

(*e*) *Sottomayer* v. *De Barros*, 5 P. D. 94; 49 L. J. P. & D. 1; and see *Harvey* v. *Farnie*, 8 App. Cas. 43; 52 L. J. P. & D. 33.

By stat. 4 Geo. 4, c. 91, marriages performed by a minister of the Church of England in the chapel of any British embassy or factory, or in the ambassador's house, or by an authorised person within the British lines, are declared to be valid. See *Lloyd* v. *Petitjean*, 2 Curt. 251.

The marriage of an officer celebrated by a chaplain of the British army within the lines of the army when serving abroad, is valid under the 9 Geo. 4, c. 91, though such army is not serving in a country in a state of actual hostility, and though no authority for the marriage was previously obtained from the officer's superior in command: *The Waldegrave Peerage*, 4 Cl. & Fin. 649.

(*f*) Mirror of Justices, p. 70; Fleta, lib. 6, c. 1.

(*g*) As to the popular and technical meaning of the word "ancestor," see *per* Kindersley, V.-C., in *Re Don's Estate*, 27 L. J., Chanc. 104, 105; S. C., 4 Drew. 194.

homo, and he only is heir who is *ex justis nuptiis procreatus* (*h*). It is, then, a rule or maxim of our law, with respect to the descent of land in England from father to son, that the son must be "*hæres legitimus*"—thus in a recent case the facts were these :—

Shaw v. Gould.

An English marriage took place between two English persons who never lived together, the husband committed adultery, and some years afterwards consented to go to Scotland to found jurisdiction against himself, because by the law of Scotland adultery without cruelty is a ground of divorce. He did so, and the Scotch court pronounced a decree of divorce *à vinculo matrimonii*. *Held*, that a Scotch marriage duly celebrated between the divorced wife and an Englishman (who was thenceforth domiciled in Scotland), did not give to their children the character of "lawfully begotten," so as to enable them to succeed to property in England—the Scotch divorce not having dissolved the English marriage (*i*).

Again, in order that land in England may descend from father to son, the son must have been born after actual marriage between his father and mother; and this is a rule *juris positivi*, as indeed are all the laws which regulate succession to real property, this particular rule having been framed for the direct purpose of excluding, in the descent of land in England, the application of the rule of the civil and canon law, *pater est quem nuptiæ demonstrant* (*k*), by which the subsequent marriage between the father and mother was held to make the son

(*h*) Co. Litt. 7. b.; cited 5 B. & C. 440, 454. The rule respecting property in the young of animals is in accordance with the Roman law, *partus sequitur ventrem*: I. 2. 1. 19; D. 6. 1. 5., § 2; *per* Byles, J., 6 C. B. N. S. 852.

(*i*) *Shaw* v. *Gould*, L. R. 3 H. L. 55. See *Birt* v. *Boutinez*, L. R. 1 P. & D. 487; and *Harvey* v. *Farnie*, 8 App. Cas. 43; 52 L. J. P. & D. 33.

(*k*) D. 2. 4. 5.

born before marriage legitimate; and this rule of descent, being a rule of positive law, annexed to the land itself, cannot be broken in upon or disturbed by the law of the country where the claimant was born. Therefore, in the case of *Doe* d. *Birtwhistle* v. *Vardill* (*l*), it was held, that a person born in Scotland of parents domiciled there, but not married till after his birth, though legitimate by the law of Scotland (*m*), could not take real estate in England as heir, the father having died intestate. And in *Re Don's Estate*, Kindersley, V.-C., held that the father of an *ante natus* born in Scotland, and legitimated by the subsequent marriage of his parents, could not, under the statute 3 & 4 Will. 4, c. 106, succeed to real estate whereof the son had died seised in England (*n*).

Doe d. *Birtwhistle* v. *Vardill.*

Heir to the father is heir to the son.

If, moreover, the parent be incapable of inheriting land himself, he has no heritable blood in him which he can transmit to his child, according to the maxim and old acknowledged rule of descent, *qui doit inheriter al père doit inheriter al fitz*,—he who would have been heir to the father shall be heir to the son; and, therefore, if, in the case first above put, *Doe* d. *Birtwhistle* v. *Vardill*, the son had died, leaving a child, before the intestate, such child could not, according to the English law, have inherited under the circumstances (*o*), and if in *Re Don's Estate* there had been a son *post natus*, such son could not have inherited to his *ante natus* brother.

Formerly also the rule was that attainder so entirely

(*l*) 2 Cl. & Fin. 571; S. C. 1 Scott, N. R. 828; 6 Bing N. C. 385; 5 B. & C. 438; explained *per* Lord Brougham, *Fenton* v. *Livingstone*, 3 Macq. Sc. App. Cas. 532; *per* Lord Cranworth, *Id.* 544. See also *Shedden* v. *Patrick*, L. R. 1 Sc. App. Cas. 470.

(*m*) See *Countess of Dalhousie* v. *M'Dowall*, 7 Cl. & Fin. 817; *Munro* v. *Munro*, *Id.* 842; *Birtwhistle* v. *Vardill*, *Id.* 895.

(*n*) 4 Drew. 194.

(*o*) 1 Scott, N. R. 842.

corrupted the blood of a person attainted that not only could no person inherit from him, but no person could inherit through him: so that if there were grandfather, father, and son—three generations, and the father was attainted, and the grandfather died seised of lands in fee, the attainted father being dead in the meantime, the grandson could not have inherited to the grandfather (*p*). Now, however, it is enacted by stat. 3 & 4 Will. 4, c. 106, s. 10, that when the person from whom the descent of any land is to be traced shall have any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the first day of January, 1834. This Act, however, by sect. 11, shall not extend to any descent which shall take place on the death of any person dying before that day.

Nullius filius.

There is likewise another rule of law immediately connected with, and similar in principle to, the preceding, which may be here properly mentioned, it is as follows:—*Qui ex damnato coitu nascuntur inter liberos non computentur* (*q*)—neither a bastard (*r*) nor any person not born in lawful wedlock can be, in the legal sense of the term, an heir (*s*); for a bastard is reckoned by the

(*p*) *Per* Kindersley, V.-C., 27 L. J., Chanc., 102, 103; S. C., 4 Drew. 194. See further as to the former law upon the subject above adverted to, *Kynnaird* v. *Leslie*, L. R. 1 C. P. 389.

(*q*) Co. Litt. 8. a.

(*r*) "The strictly technical sense of the term 'bastard' is one who is not born in lawful wedlock;" *per* Kindersley, V.-C., 27 L. J., Chanc., 102.

(*s*) Glanville, *lib.* 7, c. 13; *Shaw* v. *Gould*, *ante*, p. 481, n. (*i*).

law to be *nullius filius*, and, being thus the son of nobody, he has no inheritable blood in him (*t*), and, consequently, cannot take land by succession; and, if there be no other claimant than such illegitimate child (a circumstance which, however, can rarely happen), the land shall escheat to the lord. Moreover, as a bastard cannot be heir himself, so neither can he have any heirs but those of his own body; for, as all collateral kindred consists in being derived from the same common ancestor, and, as a bastard has no legal ancestors, he can have no collateral kindred, and consequently, can have no legal heirs but such as claim by a lineal descent from himself; and, therefore, if a bastard purchases land, and dies seised thereof without issue and intestate, the land shall escheat to the lord of the fee (*u*).

Under the stat. 3 & 4 Will. 4, c. 106, s. 2, descent is now to be traced from the purchaser, and under this section a son claiming by descent from an illegitimate father who was the purchaser, could not have transmitted the estate by descent, upon failure of his own issue, to his heir *ex parte maternâ*. But this has been remedied by a recent statute (*x*), and in such a case, instead of escheating the land will descend, the descent being traced from the person last entitled to it as if he had purchased it.

Right of inheritance follows the *lex loci*.

The right of inheritance does not follow the law of the domicile of the parties, but that of the country where the land lies, yet, with respect to personal property,

(*t*) See the argument *Stevenson's Heirs* v. *Sullivant*, 5 Wheaton (U. S.) R. 226, 227; *Id.* 262, note.

(*u*) 2 Com. by Broom & Hadley, 398 Co. Litt. 3. b.; Finch, Law, 117, 118. For a summary method of proving the legitimacy of a person see 22 & 23 Vict. c. 93.

(*x*) 22 & 23 Vict. c. 35.

which has no locality, and is of an ambulatory nature, it is part of the law of England that this description of property should be distributed according to the *jus domicilii* (*y*). "It is a clear proposition," observed Lord *Loughborough*, "not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner, both with respect to the disposition of it, and with respect to the transmission of it, either by succession, or by the act of the party; it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession" (*z*). *Mobilia sequuntur personam* (*a*), is the maxim of our own as of the Roman Law. The personal estate of a testator accompanies him wherever he may reside and become domiciled, so that he acquires the right of disposing of and dealing with it, according to the law of his domicile (*b*).

(*y*) *Per* Abbott, C.J., 5 B. & C. 451, 452; *per* Holroyd and Bayley, JJ., *Id.* 454.

(*z*) *Sill* v. *Worswick*, 1 H. Bla. 690; cited in *Freke* v. *Carbery*, L. R. 16 Eq. 466; *per* Lord Wensleydale, *Fenton* v. *Livingstone*, 3 Macq. Sc. App. Cas. 547; *per* Lord Brougham, *Bain* v. *Whitehaven and Furness Junction R. C.*, 3 H. L. Cas. 19; *Doglioni* v. *Crispin*, L. R. 1 H. L. 301.

(*a*) Story, Conf. of Laws, 8th ed., 534, *et seq.*

(*b*) *Doglioni* v. *Crispin*, L. R. 1 H. L. 301; *Bremer* v. *Freeman*, 10 Moo. P. C. C. 306; *Hodgson* v. *Beauchesne*, 12 *Id.* 285; *Crookenden* v. *Fuller*, 29 L. J. P. M. & A. 1; S. C., 1 Swab. & Tr. 441; *Anderson* v. *Lanerville*, 9 *Id.* 325.

NEMO EST HÆRES VIVENTIS. (*Co. Litt.* 22. *b.*)—*No one can be heir during the life of his ancestor.*

Meaning of rule

By law, no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is dead; before the happening of this event he is called heir-apparent, or heir-presumptive (*c*), and his claim, which can only be to an estate remaining in the ancestor at the time of his death, and of which he has made no testamentary disposition, may be defeated by the superior title of an alienee in the ancestor's lifetime, or of a devisee under his will. Therefore, if an estate be made to A. for life, remainder to the heirs of B.; now, if A. dies before B., the remainder is at an end; for, during B.'s life, he has no heir; but, if B. dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. (*d*).

So it has been said that "a will takes effect only on the testator's death; during his life it is subject to his control; and, until it was consummated by his death, no one had, in a legal view, any interest in it—*Nemo est hæres viventis*" (*e*).

Relaxation of the rule.

The general rule being, that the law recognises no one as heir until the death of his ancestor, it follows, that though a party may be heir-apparent, or heir-presumptive,

(*c*) 2 Bla. Com. by Stewart, 231; Co. Litt. 8. a.

(*d*) *Per* Patteson, J., *Doe* d. *Winter* v. *Perratt*, 7 Scott, N. R. 23, 24; S. C., 9 Cl. & Fin. 606; *per* Littledale, J., 5 B. & C. 59; 2 Com. by Broom & Hadley, 211.

(*e*) *Per* Spencer, J., *Mann* v. *Pearson*, 2 Johnson (U. S.) R. 36.

yet he is not very heir, living the ancestor: and, therefore, where an estate is limited to one as a purchaser under the denomination of heir, heir of the body, heir male, or the like, the party cannot take, as a purchaser, unless, by the death of the ancestor, he has, at the time when the estate is to vest, become very heir. But this rule has been relaxed in many instances, and an exception engrafted on it, that, if there be sufficient on the will to show, that by the word "heir" the testator meant heir-apparent, it shall be so construed; and in such a case the popular sense shall prevail against the technical (*f*). In other words, the authorities appear to establish this proposition, that, *primâ facie*, the word "heir" is to be taken in its strict legal sense; but that, if there be a plain demonstration in the will, that the testator used it in a different sense, such different sense may be assigned to it. What will amount to such plain demonstration must in each case depend on the language used, and the circumstances under which it was used and is not a question to be determined by reference to reported cases, but by a careful consideration of that language and those circumstances in the particular case under discussion (*g*).

Instances where rule is excluded.

Hence, if a devise be made to A. for life, remainder to the heirs of the body of B. so long as B. shall live, an estate *pur autre vie* being given, and the ancestor being *cestui que vie*, the rule of law would plainly be excluded. So, a devise to A. for life, remainder to the right heirs of

(*f*) *Doe* d. *Winter* v. *Perratt*, 10 Bing. 207, 208, 229. See S. C., 7 Scott, N. R. 45, *et seq.*: *Egerton* v. *Earl Brownlow*, 4 H. L. Cas. 103, 137; 1 Fearne, Cont. Rem., 10th ed., 210, and see further, as to the rule, *supra*, *Id.*, Index, tit. Maxims.

(*g*) *Per* Patteson, J., 7 Scott, N. R. 26.

B. now living, vests the remainder in B.'s heir-apparent or presumptive; and a devise to A. for life, remainder to the right heir of B., he paying to B. an annuity upon coming into possession, would clearly vest the remainder in B.'s heir-apparent (*h*). In like manner, the familiar expressions, "heir to the throne," "heir to a title or estate," "heir-apparent," "heir-presumptive," prove that the existence of a parent is quite consistent with the *popular* idea of heirship in the child. In all such cases the legal maxim has no place, nor can it have in any in which the person speaking knows of the existence of the parent, and intends that the devise to the child shall take effect during the life of the parent. It would appear that the question proper to be asked in each such case would be, "Did the testator use the word 'heir' in the strict legal sense, or in any other sense?" and, if the answer should be that he used the term, not in the legal and technical, but in some popular sense, the sense thus ascertained should be carried out (*i*).

Respecting the subject here touched upon, detailed information must be sought for in treatises more technical than this.

(*h*) *Per* Lord Brougham, 7 Scott, N. R. 46, 50.

(*i*) *Per* Lord Cottenham, 7 Scott, N. R. 60, 61; S. C., 5 B. & C. 48.

HÆREDITAS NUNQUAM ASCENDIT. (*Glanville*, lib. 7, c. 1.) —*The right of inheritance never lineally ascends.*

Rule, how applied.

The above was an express rule of the feudal law, and remained an invariable maxim (*k*) until the recent stat. 3 & 4 Will. 4, c. 106, which effected so great a change in the law of inheritance. The rule is thus stated and illustrated by *Littleton* (*l*): If there be father and son, and the father has a brother, who is, therefore, uncle to the son, and the son purchase land in fee-simple, and die without issue, living his father, the uncle shall have the land as heir to the son, and not the father, although the latter is nearer in blood, because it is a maxim in law that the inheritance may lineally descend, but not ascend. Yet if the son in this case die without issue, and his uncle enter into the land as heir to the son, and afterwards the uncle die without issue, living the father, the father shall have the land as heir to the uncle, and not as heir to the son, for he should rather come to the land by collateral descent than by lineal ascent.

It was, moreover, a necessary consequence of this rule, coupled with the maxim, *Seisina facit stipitem*, that, if, in the instance above put, the uncle did not enter into the land, the father could not inherit it, because a man claiming as heir in fee simple by descent must make himself heir to him who was last seised of the actual freehold and inheritance; and if the uncle, therefore, did not enter, he would have had but a freehold in law, and no actual freehold, and the last person seised of the actual freehold was the son, to whom the father could not make himself heir (*m*).

(*k*) 2 Com. by Broom & Hadley, 378; 3 Cruise, Dig., 4th ed., 331.

(*l*) Sect. 3.

(*m*) Co. Litt. 11. b.

The maxim, *Hæreditas nunquam ascendit*, therefore, applied only to exclude the ancestors in a direct line, for the inheritance might ascend *indirectly*, as in the preceding example, from the son to the uncle (*n*).

3 & 4 Will. 4, c. 106, s. 6.

The above rule has, however, been altered with respect to descents on deaths on or after the 1st of January, 1834, it being enacted by stat. 3 & 4 Will. 4, c. 106, s. 6, that every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue. But by sect. 7 it is provided, that none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed, and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.

Lineal descent preferred.

And here we may conveniently advert to a well-known maxim of our law, which is thus expressed: *Linea recta semper præfertur transversali* (*o*)—the right line shall

(*n*) Bracton, lib. 2, c. 29. (*o*) Co. Litt. 10. b.; Fleta, lib. 6, c. 1.

always be preferred to the collateral. It is a rule of descent that the lineal descendants *in infinitum* of any person deceased shall represent their ancestor, that is, shall stand in the same place as the person himself would have done had he been living (*p*).

Hence it is, that the son or grandchild, whether son or daughter, of the eldest son succeeds before the younger son, and the son or grandchild of the eldest brother before the younger brother; and so, through all the degrees of succession by the right of representation the right of proximity is transferred from the root to the branches, and gives them the same preference as the next and worthiest of blood (*q*).

Exclusion of the half blood.

Another rule immediately connected with the preceding, was that which related to the exclusion of the half blood, but which, originally, it would seem extended only to exclude a *frater uterinus* from inheriting land descended *à patre: frater fratri uterino non succedet in hæreditate paternâ* (*r*). This rule, however, although expressed with considerable limitation in the maxim just cited, had this more extended signification—that the heir, in order to take by descent, need not be the nearest kinsman of the whole blood; but, although a distant kinsman of the whole blood, he should nevertheless be admitted to the total exclusion of a much nearer kinsman of the half blood: and, further, that the estate should escheat to the lord, rather than the half blood should inherit (*s*).

It has, however, been observed by Mr. Preston, that the mere circumstance that a person was of the half blood

(*p*) 3 Cruise, Dig., 4th ed., 333.

(*q*) Hale, Hist., 6th ed. 322, 323; 3 Cruise, Dig., 4th ed., 333.

(*r*) Fort. de Laud. Leg. Ang., by Amos, p. 15.

(*s*) *Per* Kindersley, V.-C., 27 L. J., Chanc., 102.

to the person last seised, would not have excluded him from taking as heir, if he were of the whole blood to those ancestors through whom the descent was to be derived by *representation*: thus, if two first cousins, D. and E. had intermarried, and had issue a son, F., and D. had married again and had issue, G., and F. died seised, G. could not have taken as half brother of F., but he might as maternal cousin to him (*t*); for *Quando duo jura in unâ personâ concurrunt æquum est ac si essent in diversis* (*u*).

3 & 4 Will. 4, c. 106, s. 9.

The law on this subject has been, however, entirely altered and materially improved by the stat. 3 & 4 Will. 4, c. 106, s. 9, which enables the half blood to inherit next after any relation in the same degree of the whole blood and his issue, where the common ancestor is a male, and next after the common ancestor where a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother.

Descent of the Crown.

We may add that the rule excluding the half blood did not hold on the descent of the Crown. Therefore, if a king had issue a son and a daughter by one venter, and a son by another venter, and died; on the death of the eldest son without issue, the younger son was entitled to the Crown, to the exclusion of the daughter. For instance, the Crown actually did descend from King Edward VI. to Queen Mary, and from her to Queen Elizabeth, who were respectively of the half blood to each other. Nor did the rule apply to estates tail (*x*).

(*t*) 2 Prest. Abs. Tit. 447.

(*u*) *Id.* 449. The maxim *supra* is exemplified by *Jones* v. *Davies*, 7 H. & N. 507; S. C., 5 *Id.* 766.

(*x*) 1 Com. by Broom & Hadley, 228; Chit. Pre. Crown, 10; Litt.

PERSONA CONJUNCTA ÆQUIPARATUR INTERESSE PROPRIO. (*Bac. Max., reg.* 18.)—*The interest of a personal connection is sometimes regarded in law as that of the individual himself.*

Rule laid down by Lord Bacon.

In the words of the civil law, *jura sanguinis nullo jure civili dirimi possunt* (*y*), the law, according to Lord *Bacon*, hath so much respect for nature and conjunction of blood, that in divers cases it compares and matches nearness of blood with consideration of profit and interest, and, in some cases, allows of it more strongly. Therefore, if a man covenant in consideration of blood, to stand seised to the use of his brother or son, or near kinsman, an use is well raised by his covenant without transmutation of possession (*z*).

The above maxim, as to *persona conjuncta*, is likewise, in some cases, applicable in determining the liability of an infant on contracts, for what cannot strictly be considered as "necessaries" within the ordinary meaning of that term (*a*). Thus, as observed by Lord *Bacon*, "if a man under the years of twenty-one, contract for the nursing of his lawful child, this contract is good, and shall not be avoided by infancy, no more than if he had contracted for his own aliments or erudition." The like legal principle was, in a modern case, extended so as to render an infant widow liable upon her contract for the funeral of her husband, who had left no property to be administered (*b*).

Chapple v. *Cooper.*

The maxim under consideration does not, however,

ss. 14, 15; 3 Cruise, Dig., 4th ed., 386. See, also, Hume's Hist. of England, vol. 4, pp. 242, 265.

(*y*) D. 50. 17. 8; Bac. Max., reg. 11.

(*z*) Bac. Max., reg. 18.

(*a*) As to which see *Ryder* v. *Wombwell*, L. R. 4 Ex. 32.

(*b*) *Chapple* v. *Cooper*, 13 M. & W. 259, 260.

Qualification of rule.

apply so as to render a parent liable on the contract of the infant child, even where such contract is for "necessaries," unless there be some evidence that the parent has either sanctioned or ratified the contract. If, says Lord *Abinger*, C. B. (*c*), a father does any specific act from which it may reasonably be inferred that he has authorised his son to contract a debt, he may be liable in respect of the debt so contracted; but the mere moral obligation on the father to maintain his child affords no inference of a legal promise to pay his debts. "In order to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person; and it would bring the law into great uncertainty if it were permitted to juries to impose a liability in each particular case, according to their own feelings or prejudices." "It is," observed *Parke*, B., in the same case, "a clear principle of law, that a father is not under any legal obligation to pay his son's debts, except, indeed, by proceedings under the 43 Eliz. (*d*), by which he may, under certain circumstances, be compelled to support his children according to his ability; but the mere moral obligation to do so cannot impose upon him any legal liability" (*e*).

Again, we read, "It hath been resolved by the justices

(*c*) *Mortimore* v. *Wright*, 6 M. & W. 487; *Shelton* v. *Springett*, 11 C. B. 452. See *Ambrose* v. *Kerrison*, 10 C. B. 776 (followed in *Bradshaw* v. *Beard*, 12 C. B. N. S. 344); *Read* v. *Legard*, 6 Exch. 636, and *Rice* v. *Shepherd*, 12 C. B. N. S. 332; *Richardson* v. *Dubois*, L. R. 5 Q. B. 51. See *Bazeley* v. *Forder*, L. R. 3 Q. B. 559, as showing under peculiar circumstances the liability of the husband in respect of his wife.

(*d*) See *Grinnell* v. *Wells*, 7 M. & Gr. 1033; *Ruttinger* v. *Temple*, 4 B. & S. 491.

(*e*) For Courts of Law "are to decide according to the *legal obligations* of parties:" *per* Alderson, B., *Turner* v. *Mason*, 14 M. & W. 117.

Evidence of wife against husband, &c.

that a wife cannot be produced either against or for her husband, *quia sunt duæ animæ in carna unâ*, and it might be a cause of implacable discord and dissension between the husband and the wife, and a means of great inconvenience" (*f*). At common law, however, the above rule did not apply where a personal injury had been committed by the husband against the wife, or *vice versâ* (*g*). And the rule in question has recently been in great part abrogated by the legislature, for by "The Evidence Amendment Act, 1853" (16 & 17 Vict. c. 83), ss. 1—3, husband and wife may give evidence for or against each other—subject to these exceptions: 1st, that the husband shall not be competent or compellable to give evidence for or against his wife, nor the wife for or against her husband, "in any criminal proceeding;" and 2ndly, that "no husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage." Further, "the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties," are now, by the stat. 32 & 33 Vict. c. 68, s. 3, "competent to give evidence in such proceeding."

In the sense then above explained, and with the restrictions above suggested, must be understood the maxim illustrated by Lord *Bacon*, and with which we conclude our list of rules relative to marriage and descent—*Persona conjuncta æquiparatur interesse proprio.*

(*f*) Co. Litt. 6. b. But see 45 & 46 Vict. c. 75, s. 12, by which a married woman has the same remedies by way of criminal proceedings against her husband for the security of her separate property as though she were a *feme sole*.

(*g*) *Lord Audley's case*, 3 How. St. Tr. 402, 413.

CHAPTER VIII.

THE INTERPRETATION OF DEEDS AND WRITTEN INSTRUMENTS.

In the pages immediately following, an attempt has been made to give a general view of such maxims as are of most practical utility, and are most frequently cited with reference to the mode of construing deeds and written instruments; and some remarks have been occasionally added, showing how these rules apply to the interpretation of wills and statutes. As the authorities and decided cases on the above subject are extremely numerous, and as in a work like the present it would be undesirable, and indeed impossible, to refer to any considerable portion of them, those only have been cited which exhibit and tend to elucidate most clearly the meaning, extent, and qualifications of the various maxims; and, as far as was consistent with this plan, the more modern judgments of the courts of law have been especially consulted and selected for reference, because the principles of interpretation are better understood at the present day, and, consequently, more clearly defined and more correctly applied than they formerly were. The importance of fixed and determinate rules of interpretation is manifest, and not less manifest is the importance of a knowledge of those rules. In construing deeds and testamentary instruments, the language of which, owing

to the use of inaccurate terms and expressions, frequently falls short of, or altogether misrepresents, the views and intentions of the parties, such rules are necessary in order to insure just and uniform decisions; and they are equally so where it becomes the duty of a court of law to unravel and explain those intricacies and ambiguities which occur in legislative enactments, and which result from ideas not sufficiently precise, from views too little comprehensive, or from the unavoidable and acknowledged imperfections of language (*a*). In each case, where doubt or difficulty arises, peculiar principles and methods of interpretation are applied, reference being always had to the general scope and intention of the instrument, the nature of the transaction, and the legal rights and situation of the parties interested.

The principles developed in this chapter being applicable to the solution of many questions connected with the Law of Contracts and of Evidence, have been considered before proceeding to the subjects specified, which are briefly treated of in the concluding chapters of this work.

The rules of construction and interpretation separately considered in this chapter are the following:—1st, that an instrument shall be construed liberally and according to the intention of the parties; 2ndly, that the whole context shall be considered; 3rdly, that the meaning of a word may often be known from the context; 4thly, that no man shall derogate from his own grant; 5thly, that a latent ambiguity may, but a patent ambiguity cannot, be explained by extrinsic evidence; 6thly, that where there is no ambiguity, the natural construction shall pre-

(*a*) See Lord Teignmouth's Life of Sir W. Jones, 261.

vail; 7thly, that an instrument or expression is sufficiently certain which can be made so; 8thly, that surplusage may be rejected; 9thly, that a false description is often immaterial; 10thly, that general words may be restrained by reference to the subject-matter; 11thly, that the special mention of one thing must be understood as excluding another; 12thly, that the expression of what is implied is inoperative; 13thly, that a clause referred to must be understood as incorporated with that referring to it; 14thly, that relative words refer to the next antecedent; 15thly, that that mode of exposition is best which is founded on a reference to contemporaneous facts and circumstances; 16thly, that he who too minutely regards the form of expression, takes but a superficial and, therefore, probably an erroneous view of the meaning of an instrument.

BENIGNÆ FACIENDÆ SUNT INTERPRETATIONES PROPTER SIMPLICITATEM LAICORUM UT RES MAGIS VALEAT QUAM PEREAT; ET VERBA INTENTIONI, NON E CONTRA, DEBENT INSERVIRE. (*Co. Litt.* 36. *a.*)—*A liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties.*

The two rules of most general application in construing a written instrument are—1st, that it shall, if possible, be so interpreted *ut res magis valeat quam pereat* (*b*), and

(*b*) See *per* Erle, C.J., *Cheney* v. *Courtois*, 13 C. B. N. S. 640; *Broom* v. *Batchelor*, 1 H. & N. 255; cited in *Heffer* v. *Meadows*, L. R. 4 C. P. 600; *Steele* v. *Hoe*, 14 Q. B. 431, 445; *Ford* v. *Beech*, 11 Q. B. 852, 866, 868, 870; *Oldershaw* v. *King*, 2 H. & N. 517; S. C., *Id.* 399;

2ndly, that such a meaning shall be given to it as may carry out and effectuate to the fullest extent the intention of the parties. These maxims are, indeed, in some cases restricted by the operation of technical rules, which, for the sake of uniformity, ascribe definite meanings to particular expressions; and, in other cases, they receive certain qualifications when applied to particular instruments, such qualifications being imposed for wise and beneficial purposes; notwithstanding, however, these exceptions and qualifications, the above maxims are undoubtedly the most important and comprehensive which can be used for determining the true construction of written instruments.

General principles of construction of deeds.

It is then laid down repeatedly by the old reporters and legal writers, that in construing a deed, every part of it must be made, if possible to take effect, and every word must be made to operate in some shape or other (*c*). The construction, likewise, must be such as will preserve rather than destroy (*d*); it must be reasonable, and agreeable to common understanding (*e*); it must also be favourable, and as near the minds and apparent intents

Stratton v. *Pettit*, 16 C. B. 420; *Mare* v. *Charles*, 5 E. & B. 978; approved in *Penrose* v. *Martyr*, E. B. & E. 503.

"All contracts should, if possible, be construed *ut res magis valeat quam pereat:*" *per* Byles, J., *Vestry of Shoreditch* v. *Hughes*, 17 C. B. N. S. 162.

The maxim *supra* was applied in *Reg.* v. *Inhabitants of Broadhempston*, 1 E. & E. 154, 163; *Pugh* v. *Stringfield*, 4 C. B. N. S. 364, 370. See *Blackwell* v. *England*, 8 E. & B. 541, 549.

"If a plea admits of two constructions, one of which gives a sensible effect to the whole, and the other makes a portion of it idle and insensible, the Court is bound to adopt the former construction:" *per* Williams, J., *Peter* v. *Daniel*, 5 C. B. 579.

(*c*) Shep. Touch. 84; Plowd. 156.

(*d*) *Per* Lord Brougham, C., *Langston* v. *Langston*, 2 Cl. and Fin. 243; cited Arg., *Baker* v. *Tucker*, 3 H. L. Cas. 116.

(*e*) 1 Bulst. 175; Hob. 304.

of the parties as the rules of law will admit (*f*), and, as observed by Lord *Hale*, the judges ought to be curious and subtle to invent reasons and means to make acts effectual according to the just intent of the parties (*g*); they will not, therefore, cavil about the propriety of words when the intent of the parties appears, but will rather apply the words to fulfil the intent, than destroy the intent by reason of the insufficiency of the words (*h*).

. It may, indeed, chance that, on executing an agreement under seal, the parties thereto failed to contemplate the happening of some particular event, or the existence of some particular state of facts at a period subsequent thereto (*i*); and all the Court can do in such a case, is to ascertain the meaning of the words actually used; and, in construing the deed, they will adopt the established rule of construction, "to read the words in their ordinary and grammatical sense, and to give them effect, unless such a construction would lead to some absurdity or inconvenience (*k*), or would be plainly repugnant to the intention of the parties to be collected from other parts of the deed" (*l*). For "the golden rule of construction," to which we shall presently revert, "is that words are to be construed according to their natural meaning, unless such a construction would either render them senseless or would be opposed to the general scope and intent of the

(*f*) 1 Anderson, 60; Jenk. Cent. 260.

(*g*) *Crossing* v. *Scudamore*, 2 Lev. 9; *per* Lord Hobart, Hob. R. 277, cited Willes, R., 682; *Moseley* v. *Motteux*, 10 M. & W. 533.

(*h*) 1 Plowd. 159, 160, 162.

(*i*) See Judgm., *Lloyd* v. *Guibert*, L. R. 1 Q. B. 120.

(*k*) The element of inconvenience is not to be considered if the construction of the document is clear. *Bottomley's case*, 16 Ch. Div. 681, 686; 50 L. J. Ch. 167.

(*l*) *Per* Parke, B., *Bland* v. *Crowley*, 6 Exch. 529.

instrument, or unless there be some very cogent reason of convenience in favour of a different interpretation" (*m*).

Deeds shall be made operative, if possible.

Deeds, then, shall be so construed as to operate according to the intention of the parties, if by law they may; and if they cannot in one form, they shall operate in that which by law will effectuate the intention: *Quando res non valet ut ago, valeat quantum valere potest* (*n*). For, in these later times, the judges have gone further than formerly, and have had more consideration for the substance, to wit, the passing of the estate according to the intent of the parties, than the shadow, to wit, the manner of passing it (*o*).

Roe v. *Tranmarr.*

Thus, where A., in consideration of natural love and of 100*l.*, by deeds of lease and release, granted, released, and confirmed certain premises, after his own death, to his brother B., in tail, remainder to C., the son of another brother of A., in fee; and he covenanted and granted that the premises should, after his death, be held by B. and the heirs of his body, or by C. and his heirs, according to the true intent of the deed; it was held, that, although the deed could not operate as a release, because it attempted to convey a freehold *in futuro*, yet it was good as a covenant to stand seised (*p*). So, if the King's charter will bear a

(*m*) *Per* Bramwell, B., *Fowell* v. *Tranter*, 3 H. & C. 461.

(*n*) *Per* Lord Mansfield, C.J., *Goodtitle* v. *Bailey*, Cowp. 600; cited *Roe* d. *Earl of Berkeley* v. *Archbishop of York*, 6 East, 105; 1 Ventr. 216. See also the instances of the above rule mentioned in *Gibson* v. *Minet*, 1 H. Bla. 614, 620.

(*o*) *Osman* v. *Sheaf*, 3 Lev. 370; cited *Doe* d. *Lewis* v. *Davies*, 2 M. & W. 516; *per* Willes, C.J., *Smith* v. *Packhurst*, 3 Atk. 136; cited, *Marquis of Cholmondeley* v. *Lord Clinton*, 2 B. & Ald. 637; *Tarleton* v. *Staniforth*, 5 T. R. 695; *per* Maule, J., *Borradaile* v. *Hunter*, 5 Scott, N. R. 431, 432; 2 Wms. Saund. 96 a, n. (1); 3 Prest. Abstr. Tit. 21, 22; 1 *Id.* 313.

(*p*) *Roe* v. *Tranmarr*, Willes, R. 682. See the cases collected 2 Wms. Saund. 96 a, n. (1); 1 Prest. Abstr. Tit. 313; 1 Rep. 76; *Perry* v.

double construction, one which will carry the grant into effect, the other which will make it inoperative, the former is to be adopted (*q*). And generally, "if words have a double intendment, and the one standeth with law, and the other is against law, they are to be taken in the sense which is agreeable to law" (*r*).

In accordance with the same principle of construction, where divers persons join in a deed, and some are able to make such deed, and some are not able, this shall be said to be his deed alone that is able (*s*); and if a deed be made to one that is incapable and another that is capable, it shall enure only to the latter (*t*). So, if mortgagor and mortgagee join in a lease, this enures as the lease of the mortgagee, and the confirmation of the mortgagor (*u*). And if there be a joint lease by tenant for life and remainderman, such lease operates during the life of the tenant as his demise, confirmed by the remainderman, and afterwards as the demise of such last-mentioned party (*x*).

Rule as to deeds further considered.

The preceding examples may suffice to show that where a deed cannot operate in the precise manner or to the full extent intended by the parties, it shall, nevertheless, be

Watts, 4 Scott. N. R. 366; *Doe* d. *Daniell* v. *Woodroffe*, 10 M. & W. 608; 15 M. & W. 769; 2 H. L. Cas. 811.

"The general rule," also, "is that a covenant not to sue when it does not affect other parties, and is so intended, may be pleaded as a release." *Per* Byles, J., *Ray* v. *Jones*, 19 C. B. N. S. 423. A deed of bargain and sale void for want of inrolment will operate as a grant of the reversion; *Haggerston* v. *Hanbury*, 5 B. & C. 101; *Adams* v. *Steer*, Cro. Jac. 210.

(*q*) *Per* Tindal, C.J., *Rutter* v. *Chapman*, 8 M. & W. 102.

(*r*) Shep. Touch. 80, adopted *per* Martin, B., *Fussell* v. *Daniel*, 10 Exch. 597; Co. Litt. 42 a. 183; Noy, Max., 9th ed. 211.

(*s*) Shep. Touch. 81; Finch, Law, 60.

(*t*) Shep. Touch. 82.

(*u*) *Doe* d. *Barney* v. *Adams*, 2 Cr. & J. 232; *per* Lord Lyndhurst, C. B., *Smith* v. *Pocklington*, 1 Cr. & J. 446.

(*x*) *Treport's case*, 6 Rep. 15.

made as far as possible to effectuate their intention. Acting, moreover, on a kindred principle, the Court will endeavour to affix such a meaning to words of obscure and doubtful import occurring in a deed, as may best carry out the plain and manifest intention of the parties, as collected from the four corners of the instrument,—with these qualifications, however, that the intent of the parties shall never be carried into effect contrary to the rules of law, and that, as a general rule, the Court will not introduce into a deed words which are not to be found there (*y*), nor strike out of a deed words which are there in order to make the sense different (*z*). The following important illustrations of the above propositions may advantageously be noticed, and many others of equal practical importance will, doubtless, suggest themselves to the reader.

Instrument of demise.

In cases prior to and excluded from the operation of the stats. 7 & 8 Vict. c. 76 s. 4 (*a*), and 8 & 9 Vict. c. 106, s. 3 (*b*), the question whether a particular instrument should be construed as a lease or as an agreement for a lease must be answered by considering the intention of the parties, as collected from the instrument itself; and any words which suffice to explain the intent of the parties, that the one should divest himself of the possession, and the other come into it for such a determinate time, whether they run in the form of a licence, covenant,

(*y*) *Vide, per* Willes, C.J., *Parkhurst* v. *Smith*, Willes, 332; cited and applied *per* Alexander, C.B., *Colmore* v. *Tyndall*, 2 Yo. & J. 618; *per* Lord Brougham, C., *Langston* v. *Langston*, 2 Cl. & Fin. 243; *Pannell* v. *Mill*, 3 C. B. 625, 637.

(*z*) *White* v. *Burnby*, 16 L. J. Q. B. 156; *secus* as to mere surplusage, *post*.

(*a*) See *Burton* v. *Reevel*, 16 M. & W. 307; *Bond* v. *Rosling*, 1 B. & S. 371.

(*b*) See *Rollason* v. *Leon*, 7 H. & N. 73.

or agreement, will of themselves be held, in construction of law, to amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose (*c*).

Construction of covenants.

The rules applicable and cases decided with reference to the construction of covenants will also be found to furnish strong and abundant instances of the anxiety which our Courts evince to effectuate the *real intention* (*d*) of the parties to a deed or agreement (*e*); for it is not necessary, in order to charge a party with a covenant, that there should be express words of covenant or agreement, but it is enough if the intention of the parties to create a covenant be apparent (*f*). Where, therefore, words of recital (*g*) or reference manifest a clear intention that the parties shall do certain acts, the Courts will, from these words, infer a covenant to do such acts, and will sustain actions of covenant for their non-performance as effectually as if the instruments had contained express covenants to perform them (*h*). In brief, "no particular

(*c*) Bac. Abr. "*Leases*" (K.); and 2 Shep. Touch., by Preston, 272; cited Judgm., *Doe* d. *Parsley* v. *Day*, 2 Q. B. 152 *et seq.*; *Alderman* v. *Neate*, 4 M. & W. 704.

(*d*) Such intention may however be frustrated by the operation of a positive and technical rule of law. "A technical rule is one which is established by authority and precedent, which does not depend upon reasoning or argument, but is a fixed established rule to be acted upon, and only discussed as regards its application—in truth is the law." Such a rule is that where a deed is made *inter partes*—no one who is not expressed to be a party can sue upon a covenant contained in it; *Chesterfield, &c., Colliery Co.* v. *Hawkins*, 3 H. & C. 677, 691, cited in *Gurrin* v. *Kopera*, *Id.* 699.

(*e*) See *Doe* d. *Rogers* v. *Price*, 8 C. B. 894.

(*f*) *Per* Tindal, C.J., *Courtney* v. *Taylor*, 7 Scott, N. R. 765; *Wood* v. *The Copper-miners' Co.*, 7 C. B. 906; *per* Parke, B., *Rigby* v. *Great Western R. C.*, 14 M. & W. 815; and in *James* v. *Cockrane*, 7 Exch. 177; S. C., 8 *Id.* 556; *Farrall* v. *Hilditch*, 5 C. B. N. S. 840. See *Bealey* v. *Stuart*, 7 H. & N. 753, 759.

(*g*) See *Lay* v. *Mottram*, 19 C. B. N. S. 479.

(*h*) Judgm., *Aspdin* v. *Austin*, 5 Q. B. 683; cited *Dunn* v. *Sayles*,

form of words is necessary to form a covenant; but wherever the Court can collect from the instrument an engagement on the one side to do or not to do something, it amounts to a covenant, whether it is in the recital or in any other part of the instrument (*i*).

Joint or several covenant or bond.

In like manner, where the language of a covenant is such that the covenant may be construed either as joint or as several, it shall be taken, at common law, to be joint or several, according to the interest of the covenantees. Where, however, the covenant is in its terms expressly and positively joint, it must be construed as a joint covenant in compliance with the declared intention of the parties (*k*).

Dependent or independent covenants.

In like manner, the rule has been established by a long series of decisions in modern times, that the question, whether covenants are to be held dependent or independent of each other, is to be determined by the intention or meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case: to the intention, when once dis-

Id. 692; and in *Churchward* v. *Reg.*, L. R. 1 Q. B. 191, 208, and *Rust* v. *Nottidge*, 1 E. & B. 104; *Williams* v. *Burrell*, 1 C. B. 429, where the distinction between express covenants and covenants in law is pointed out. *Per* Crompton, J., 2 B. & S. 516.

(*i*) *Per* Parke, B., *Great Northern R. C.* v. *Harrison* 12 C. B. 609; Judgm., *Rashleigh* v. *South Eastern R. C.*, 10 C. B. 632, as to which case see *Knight* v. *Gravesend and Milton Waterworks Co.*, 2 H. & N. 10, 11.

(*k*) Judgm., *Bradburne* v. *Botfield*, 14 M. & W. 564, 572; *Haddon* v. *Ayers*, 1 E. & B. 118; *Pugh* v. *Stringfield*, 3 C. B. N. S. 2; *per* Maule, J., *Beer* v. *Beer*, 12 C. B. 78; citing *Wetherell* v. *Langston*, 1 Exch. 634; *Hopkinson* v. *Lee*, 6 Q. B. 964; *Foley* v. *Addenbrooke*, 4 Q. B. 207; followed in *Thompson* v. *Hakewill*, 19 C. B. N. S. 713, 728; *Sorsbie* v. *Park*, 12 M. & W. 146; *Mills* v. *Ladbroke*, 7 Scott, N. R. 1005, 1023; *per* Parke, B., *Wootton* v. *Steffenoni*, 12 M. & W. 134; *Harrold* v. *Whitaker*, 11 Q. B. 147, 163; *Wakefield* v. *Brown*, 9 Q. B. 209, followed in *Magnay* v. *Edwards*, 13 C. B. 479.

covered, all technical forms of expression must give way (*l*). Where, therefore, a question arose whether certain covenants in marriage articles were dependent or not, Lord *Cottenham*, C., observed, "If the provisions are clearly expressed, and there is nothing to enable the Court to put upon them a construction different from that which the words import, no doubt the words must prevail: but if the provisions and expressions be contradictory, and if there be grounds appearing upon the face of the instrument, affording proof of the real intention of the parties, then that intention will prevail against the obvious and ordinary meaning of the words. If the parties have themselves furnished a key to the meaning of the words used, it is not material by what expression they convey their intention" (*m*).

The notes to *Pordage* v. *Cole* (*n*) may usefully be referred to when construing a particular clause in a contract for the purpose of ascertaining whether the breach of that part of the contract entitles the other contracting party to put an end to it, or whether on the other hand it only entitles him to damages. If the clause or stipulation goes

(*l*) Judgm., *Stavers* v. *Curling*, 3 Bing. N. C. 368; *Baylis* v. *Le Gros*, 4 C. B. N. S. 537; *London Gas Light Co.* v. *Vestry of Chelsea*, 8 C. B. N. S. 215; *Sibthorp* v. *Brunel*, 3 Exch. 826, 828; *Hemans* v. *Picciotto*, 1 C. B. N. S. 646. See *Mackintosh* v. *Midland Counties R. C.*, 14 M. & W. 548.

The answer to the question, what is or what is not a condition precedent, depends not on merely technical words but on the plain intention of the parties to be deduced from the whole instrument; *Roberts* v. *Brett*, 11 H. L. Cas. 337, 354.

(*m*) *Per* Lord Cottenham, C., *Lloyd* v. *Lloyd*, 2 My. & Cr. 202.

(*n*) Williams' Notes to Saunders, Vol. I., 548; *Jonassohn* v. *Young*, 4 B. & S. 296. In the notes to *Pordage* v. *Cole*, are specified various cases in which the Court has done great violence to the strict letter of covenants for the purpose of carrying into effect what was considered to be the real intention of the parties.

See *Marsden* v. *Moore*, 4 H & N. 504, where *Pordage* v. *Cole*, is cited and distinguished.

to the root of the contract between the parties, the contract may be put an end to; if it goes only to part of the consideration on both sides, the sole remedy is by way of damages.

General rule as to construing an agreement or contract.

The same sense, we may in the next place observe, is to be put upon the words of a contract in an instrument under seal as would be put upon the same words in any instrument not under seal: that is to say, the same intention must be collected from the same words, whether the particular contract in which they occur be special or not (*o*).

In the case, then, of a contract or agreement, whether by deed or parol, the Courts are bound so to construe it, *ut res magis valeat quam pereat*—that it may be made to operate rather than be inefficient; and, in order to effect this, the words used shall have a reasonable intendment and construction (*p*). Thus, where A. guaranteed to B. the payment of all bills of exchange drawn by B. on and accepted by C., and the payment of any balance that might be due from C. to B., the Court observing that if the words "might be due" were to be limited to past transactions the guarantee would be void for want of consideration, and as the document must be construed if possible, so as to make it operative, decided, that the guarantee extended to future as well as past transactions. It should be noticed with reference to this case that *Bramwell*, B., differed from the majority of the Court upon the ground that the words *primâ facie* referred to past transactions, and that the maxim is inapplicable where there are extrinsic circumstances in relation to which the words used are in their primary sense intel-

(*o*) *Per* Lord Ellenborough, C.J., 13 East, 74.

(*p*) Com. Dig., "*Pleader*," (C. 25); Bac., Works, vol. 4, p. 25; Noy, Max., 9th ed., p. 50.

ligible (*q*). Words of art, which, in the understanding of conveyancers, have a peculiar technical meaning, shall not be scanned and construed with a conveyancer's acuteness, if, by so doing, one part of the instrument is made inconsistent with another, and the whole is incongruous and unintelligible; but the Court will understand the words used in their popular sense, and will interpret the language of the parties *secundum subjectam materiem*, referring particular expressions to the particular subject-matter of the agreement, so that full and complete force may be given to the whole (*r*).

Charter-party.

Whether, for example, a particular clause in a charter-party shall be held to be a condition, upon the non-performance of which by the one party, the other is at liberty to abandon the contract, and consider it at an end, —or whether it amounts to an agreement only, the breach whereof is to be recompensed by an action for damages, —must depend, in each particular case, upon the intention of the parties to be collected from the terms of the agreement itself, and from the subject-matter to which it relates; it cannot depend on any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract (*s*). In such

(*q*) *Broom* v. *Batchelor*, 1 H. & N. 255.

(*r*) *Hallewell* v. *Morrell*, 1 Scott, N. R. 309; *per* cur., *Hill* v. *Grange*, Plowd. 164, 170; cited Arg., 2 Q. B. 509; *per* Willes, C.J., Willes, R., 332; *Heseltine* v. *Siggers*, 1 Exch. 856. If an instrument is capable of two constructions, that one shall be preferred which will make the instrument operate rightfully; *Faunsett* v. *Carpenter*, 2 Dow. & Clark. N. S. 232.

As to construing an award, see *Law* v. *Blackburrow*, 14 C. B. 77; *Mays* v. *Cannell*, 15 C. B. 107, and cases there cited.

(*s*) Judgm., *Glaholm* v. *Hays*, 2 Scott, N. R. 482; recognised in *Ollive* v. *Booker*, 1 Exch. 416, 423; *Behn* v. *Burness*, 32 L. J. Q. B. 204; S. C., 1 B. & S. 877; *Seeger* v. *Duthrie*, 8 C. B. N. S 45; *Oliver* v. *Fielden*, 4 Exch. 135, 138; and *Crookewit* v. *Fletcher*, 1 H. & N. 911; *Gattorno* v. *Adams*, 12 C. B. N. S. 560; *per* Lord Ellenborough, C.J., *Ritchie* v.

a case, therefore, the rule applies, *In conventionibus contrahentium voluntas potius quam verba spectari placuit* (*t*)—in contracts and agreements the intention of the parties, rather than the words actually used by them should be considered (*u*).

Meaning of words.

Subject, however, to the preceding remarks, Courts will apply the ordinary rules of construction in interpreting instruments, and will construe words according to their strict and primary acceptation, unless, from the immediate context or from the intention of the parties apparent on the face of the instrument, the words appear to have been used in a different sense, or unless, in their strict sense, they are incapable of being carried into effect. It must, moreover, be observed that the meaning of a particular word may be shown by parol evidence to be different in some specified place, trade, or business, from its proper and ordinary acceptation (*x*); various cases illustrating this remark will be hereafter cited.

Patent, construction of.

With respect to patents, it was long since observed by Lord *Eldon*, that they are to be considered as bargains between the inventor and the public, to be judged of on the principles of good faith, by making a fair disclosure of the invention, and to be construed as other bargains (*y*). Moreover, although formerly there seems to have been

Atkinson, 10 East, 306; Judgm., *Furze* v. *Sharwood*, 2 Q. B. 415. See *White* v *Beeton*, 7 H. & N. 42.

(*t*) 17 Johns. (U.S.) R. 150, and cases there cited.

(*u*) *Dimech* v. *Corlett*, 12 Moo., P. C. C. 199, 228, citing *Glaholm* v. *Hays*, *supra*.

(*x*) See *per* Pollock, C.B., *Mallan* v. *May*, 13 M. & W. 511; *Lewis* v. *Marshall*, 8 Scott, N. R. 477, 494; *per* Parke, B., *Clift* v. *Schwabe*, 3 C. B. 469, 470; *per* Lord Cranworth, C., 6 H. L. Cas. 78; *post*, Chap. X.

(*y*) *Per* Alderson, B., *Neilson* v. *Harford*, Webs. Pat. Cas. 341; Norman on Patents, 78, 79.

The mode of construing a patent as between the patentee and the Crown, is stated *post*.

very much a practice, with both judges and juries, to destroy the patent right even of beneficial patents, by exercising great astuteness in taking objections as to the title of the patent, and more particularly as to the specification, in consequence of which many valuable patent rights have been destroyed; yet, more recently, the Courts have not been so strict in taking objections to the specification, but have rather endeavoured to deal fairly both with the patentee and the public, willing to give to the patentee, on his part, the reward of a valuable patent, but taking care to secure to the public, on the other hand, the benefit of that proviso (*i.e.*, the proviso requiring a specification) which is introduced into the patent for their advantage, so that the right to the patent may be fairly and properly expressed in the specification (*z*). In construing a specification accordingly, the whole instrument must be taken together, and a fair and reasonable interpretation is be given to the words used in it (*a*); the words of the specification being construed according to their ordinary and proper meaning, unless there be something in the context to give them a different meaning, or unless the facts properly in evidence, and with reference to which the patent must be construed, should show that a different interpretation ought to be made (*b*). It has

(*z*) *Per* Parke, B., *Neilson's Patent*, Webs. Pat. Cas. 310; *per* Alderson, B., *Morgan* v. *Seaward*, *Id.* 173, who observes: "It is the duty of a party who takes out a patent to specify what his invention really is; and although it is the bounden duty of a jury to protect him in the fair exercise of his patent right, it is of great importance to the public, and by law it is absolutely necessary, that the patentee should state in his specification, not only the nature of his invention, but how that invention may be carried into effect."

(*a*) *Beard* v. *Eyerton*, 8 C. B. 165.

(*b*) Judgm., *Elliott* v. *Turner* (in error), 2 C. B. 446, 461. As to construing a specification which contains terms of art, see *Betts* v. *Menzies*, 10 H. L. Cas. 117.

been laid down that the test of the sufficiency of a specification is whether it would enable an ordinary workman, exercising the actual knowledge common to the trade, to make the machine (*c*). It was attempted in a recent case to introduce evidence of the various patents in existence at the time the particular patent was granted, the specification of which was under consideration, for the purpose of construing the specification so as to exclude from its operation prior patents, and thereby make it valid. It was held such evidence could not be used for this purpose, although it was properly admissible to explain words of art to be found in the specification in question, and that words used in a patent must be construed, like the words of any other instrument, in their natural sense, regard being had to the fact that the document is not addressed to the world at large, but to a particular class possessing a certain amount of knowledge on the subject (*d*).

Extrinsic evidence to explain specification.

The following remarks of Lord *Ellenborough*, C. J., with reference to a policy of insurance, here also occur to mind as generally applicable. "The same rule of construction," says that learned Judge, "which applies to all other instruments, applies equally to this instrument of a policy of insurance, viz., that it is to be construed according to its sense and meaning, as collected, in the first place, from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter,—as by the known usage of trade, or

Policy of insurance.

(*c*) *Plimpton* v. *Malcolmson*, 3 Ch. Div. 531; 45 L. J. Ch. 505; *Morgan* v. *Seaward*, 1 Webs. P. R. 174.

(*d*) *Clark* v. *Adie*, 2 App. Cases, 423; 46 L. J. Ch. 585, 598.

the like,—acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense" (*e*). And again, "the contract of insurance," it has been said, "though a mercantile instrument, is to be construed according to the same rules as all other written contracts, namely, the intention of the parties, which is to be gathered from the words of the instrument, interpreted together with the surrounding circumstances. If the words of the instrument are clear in themselves, the instrument must be construed accordingly, but if they are susceptible of more meanings than one, then the judge must inform himself by the aid of the jury and the surrounding circumstances which bear on the contract" (*f*).

Rules to be observed in construing a will.

In construing a will, it has been said, that the intention of the testator is the polar star by which the Court should be guided, provided no rule of law is thereby infringed (*g*). "It is the duty of those who have to expound a will, if they can, *ex fumo dare lucem*" (*h*). In other words, the first thing for consideration always is, what was the

(*e*) *Robertson* v. *French*, 4 East, 135, 136; cited *per* Lord Tenterden, C.J. *Hunter* v. *Leathley*, 10 B. & C. 871.

(*f*) *Per* Erle, C.J., *Carr* v. *Montefiore*, 5 B. & S. 428; citing *Robertson* v. *French*, *supra*.

(*g*) *Per* Lord Kenyon, C.J., *Watson* v. *Foxon*, 2 East, 42; *per* Willes, C.J., *Doe* v. *Underdown*, Willes, R. 296; *per* Buller, J., *Smith* v. *Coffin*, 2 H. Bla. 450; cases cited, Arg. *Ley* v. *Ley*, 3 Scott, N. R. 168; *Doe* d. *Amlot* v. *Davies*, 4 M. & W. 599, 607; *Doe* d. *Tremewen* v. *Permewen*, 11 A. & E. 131; *per* Parke, B., *Grover* v. *Burningham*, 5 Exch. 191; *Martin* v. *Lee*, 14 Moo., P. C. C. 142.

(*h*) *Per* V.-C. E., *De Beauvoir* v. *De Beauvoir*, 15 L. J., Chanc. 308; S. C., 15 Sim. 163; 3 H. L. Cas. 524.

testator's intention at the time he made the will; and then the law carries that intention into effect as nearly as it can, according to certain settled technical rules (*i*).

"Touching the general rules to be observed for the true construction of wills," says *Dodderidge*, J.,—"*in testamentis plenius testatoris intentionem scrutamur*. But yet this is to be observed with these two limitations: 1st, his intent ought to be agreeable to the rules of law: 2ndly, his intent ought to be collected out of the words of the will. As to this it may be demanded, how shall this be known? To this it may be thus answered: first, to search out what was the scope of his will; secondly, to make such a construction, so that all the words of the will may stand; for to add anything to the words of the will, or in the construction made to relinquish and leave out any of the words, is *maledicta glossa*. But every string ought to give its sound" (*k*).

In a modern case, involving important interests (*l*), the following were laid down as the leading and fundamental rules for construing a will. In the first place, the intention of the testator ought to be the only guide of the Court to the interpretation of his will; yet it must be his intention as collected from the words employed by himself in his will (*m*). No surmise or conjecture of any object

(*i*) Judgm., *Doe* d. *Scott* v. *Roach*, 5 M. & S. 490; *Hodgson* v. *Ambrose*, Dougl. 341; *Festing* v. *Allen*, 12 M. & W. 279; *Alexander* v. *Alexander*, 16 C. B. 59; *Doe* d. *Bills* v. *Hopkinson*, 5 Q. B. 223; *Doe* d. *Stevenson* v. *Glover*, 1 C. B. 459.

"The general rule in interpreting a will and codicil is that the whole of the will takes effect, except in so far as it is inconsistent with the codicil."

Judgm., *Robertson* v. *Powell*, 2 H. & C. 766–7; citing *Doe* d. *Hearle* v. *Hicks*, 1 Cl. & F. 20; Judgm., *Richardson* v. *Power*, 19 C. B. N. S. 799.

(*k*) *Per* Dodderidge, J., *Blamford* v. *Blamford*, 3 Buls. 103. See *Parker* v. *Tootal*, 11 H. L. Cas. 143.

(*l*) *Earl of Scarborough* v. *Doe* d. *Savile*, 3 A. & E. 897.

(*m*) In *Doe* d. *Sams* v. *Garlick*, 14 M. & W. 701, Parke, B., ob-

which the testator may be supposed to have had in view can be allowed to have any weight in the construction of his will, unless such object can be collected from the plain language of the will itself (*n*).

Lord *Cottenham*, in the somewhat curious case of the *Earl of Hardwicke* v. *Douglas* (*o*), thus stated the rule: "It is not, according to my impression of the rule upon which the Courts have acted, consistent with the principles of construction to set aside the effect of clear and unambiguous words because there is reason to suppose that they do not produce the effect which the testator intended they should produce. If there be any ambiguity, then of course it is the duty of all Courts to put that construction upon the words which seems best to carry the intention into effect; but if there be no ambiguitity, however unfortunate it may be that the intention of the testator shall fail, there is no right in any Court of Justice to say those words shall not have their plain and unambiguous meaning."

In the second place, it is a necessary rule in the investigation of the intention of a testator, not only that regard should be paid to the words of the will, in order to determine the operation and effect of the devise, but that the

serves, that difficulties have arisen from confounding the testator's *intention* with his *meaning*. "*Intention* may mean what the testator intended to have done, whereas the only question in the construction of wills is on the *meaning of the words*." In *Grover* v. *Burningham*, 5 Exch. 194, Rolfe, B., also observes, "We are to ascertain by construing the will *non quod voluit sed quod dixit*, or rather we are to ascertain *quod voluit* by interpreting *quod dixit*." And see, *per* Lord Wensleydale, *Grey* v. *Pearson*, 6 H. L. Cas. 106; and in *Slingsby* v. *Grainger*, 7 H. L. Cas. 284.

(*n*) Judgm., *Earl of Scarborough* v. *Doe* d. *Savile*, 3 A. & E. 962, 963; cited 8 M. & W. 200.

(*o*) 7 Clark & Fin. 795, 815. See also *Quicke* v. *Leach*, 13 M. & W. 218.

legal consequences which may follow from the nature and qualities of the estate, when once collected from the words of the will itself, should be altogether disregarded (*p*); for example, in determining whether the intention of the testator was, in any particular case to give the devisee an estate-tail, or for life only, it is not a sound or legitimate mode of reasoning to import into the consideration of the question, that, if the estate is held to be an estate-tail, the devisee will have the power of defeating the intention of the testator altogether; for the Court will not assume that the testator was ignorant of the legal consequence and effect of the disposition which he has himself made (*q*); and a person ought to direct his meaning according to the law, and not seek to mould the law according to his meaning; for, if a man were assured, that, whatever words he made use of, his meaning only would be considered, he would be very careless about the choice of his words, and the attempt to explain his meaning in each particular case would give rise to infinite confusion and uncertainty (*r*).

Hence, although it is the duty of the Court to ascertain and carry into effect the intention of the party, yet there are, in many cases, fixed and settled rules by which that intention is determined; and to such rules the wisest judges have thought proper to adhere, in opposition to their own private opinions as to the probable intention of the party in any particular case (*s*).

(*p*) At the same time the circumstance, that the language if strictly construed will lead to a consequence inconsistent with the presumable intention, is not to be left out of view, especially if other considerations lead to the same result: Judgm., *Quicke* v. *Leach*, 13 M. & W. 228.

(*q*) 3 A. & E. 963, 964; *per* Parke, B., *Morrice* v. *Langham*, 8 M. & W. 207.

(*r*) Plowd. 162.

(*s*) See, *per* Alexander, C.B., 6 Bing. 478; Judgm., 2 Phill. 68.

The object, indeed, of all such technical rules is to create certainty, and to prevent litigation, by enabling those who are conversant with these subjects to give correct advice, which would evidently be impossible if the law were uncertain and liable to fluctuation in each particular case (*t*).

In accordance with the remarks above offered, *Parke*, B., in an important case respecting the application of the rule against perpetuities, thus expressed himself:—"We must first ascertain the intention of the testator, or more properly the meaning of his words, in the clause under consideration, and then endeavour to give effect to them so far as the rules of law will permit. Our first duty is to construe the will, and this we must do exactly in the same way as if the rule against perpetuity had never been established, or were repealed when the will was made, not varying the construction in order to avoid the effect of that rule, but interpreting the words of the testator wholly without reference to it" (*u*).

Rule in *Shelley's case*.

The rule in *Shelley's case* (*x*)—by which, where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate, to his heirs or the heirs of his body, the word "heirs" is construed as a word of limitation (*y*)—will occur to the reader as a familiar instance of an arbitrary and technical rule of construction, the authority of which

(*t*) *Per* Pollock, C.B., *Doe* d. *Sams* v. *Garlick*, 14 M. & W. 707.

(*u*) *Per* Parke, B., *Lord Dungannon* v. *Smith*, 12 Cl. & Fin. 599; distinguished in *Christie* v. *Gosling*, L. R. 1 H. L. 279.

(*x*) As to which see 2 Com. by Broom & Hadley, 330.

(*y*) 2 Jarm., Wills, 4th ed., 332. See *Harrison* v. *Harrison*, 8 Scott, N. R. 862, 873; *Cole* v. *Goble*, 13 C. B. 445; *Jordan* v. *Adams*, 6 C. B. N. S. 748.

is acknowledged by the Courts, even where its application may tend to defeat the intention of the testator.

So, in construing a power to lease contained in a will, the Courts have said, it "becomes necessary to look to the language of the testator in the creation of the power itself, and to ascertain his intention by considering the true meaning of the language which he has used, giving to it its natural signification according to the ordinary rules of interpretation; giving effect, if possible, to every part of the clause; and if any part of it be ambiguous, interpreting it by reference to the context, to the general intent of the will, and, if necessary, to the surrounding circumstances" (*z*).

Technical expressions.

Not only are there fixed and established rules by which the Courts will, in certain cases, be guided in determining the legal effect and operation of a testamentary instrument, but there are likewise certain technical expressions of which the established legal interpretation is different from the meaning which in ordinary language would be attributed to them; and, consequently, a will in which such expressions occur may, in some cases, be made to operate in a manner different from that intended by the testator (*a*): the duty of the Court being to give effect to *all* the words of the will, if that can be done without violating any part of it, and also to construe

(*z*) Judgm., *Jegon* v. *Vivian*, L. R. 2 C. P. 427; S. C., affirmed L. R. 3 H. L. 285.

"Facts extrinsic to the will must be ascertained for the Court in the usual manner, either by admission of the parties or by a jury. When they have been ascertained, the operation of construction is to be performed by the Court." Judgm., *Webber* v. *Stanley*, 16 C. B. N. S. 752.

(*a*) See 2 Powell on Devises, by Jarman, 3rd. ed., 564, *et seq.*; *Doe* d. *Blesard* v. *Simpson*, 3 Scott, N. R. 774; cited, *per* Byles, J., *Richards* v. *Davies*, 13 C. B. N. S. 87, and distinguished in *Hardcastle* v. *Denison*, 10 C. B. N. S. 606.

technical words in their proper sense, where they can be so understood consistently with the context (*b*).

The following observations of V.-C. *Knight Bruce*, although having reference to the particular circumstances of the case immediately under his consideration, show clearly the general principles which guide the Court in assigning a meaning to technical expressions.

"Both reason and authority, I apprehend," says the learned Judge, "support the proposition that the defendants are entitled to ask the Court to read and consider the whole of the instrument in which the clause stands; and, in reading and considering it, to bear in mind the state of the testator's family, as at the time when he made the codicil he knew it to be; and if the result of so reading and considering the whole document with that recollection is to convince the Court, from its contents, that the testator intended to use the words in their ordinary and popular sense, and not in their legal and technical sense, as distinguishable from their ordinary and popular sense, to give effect to that conviction by deciding accordingly" (*c*).

(*b*) Judgm., *Doe* d. *Cape* v. *Walker*, 2 Scott, N. R. 334; *Towns* v. *Wentworth*, 11 Moo., P. C. C. 526, 543; *per* Martin, B., *Biddulph* v. *Lees*, E. B. & E. 317; *per* Alderson, B., *Lees* v. *Mosley*, 1 Yo. & Coll. 589; cited Arg. *Greenwood* v. *Rothwell*, 6 Scott, N. R. 672. See, also, Arg. *Festing* v. *Allen*, 12 M. & W. 286; *Jack* v. *M'Intyre*, 12 Cl. & Fin. 158; *Jenkins* v. *Hughes*, 8 H. L. Cas. 571.

Where the testator appears to have been very illiterate, "the rules of grammar and the usual meaning of technical language may be disregarded in construing his will;" *per* Lord Campbell, C., *Hall* v. *Warren*, 9 H. L. Cas. 427.

Generally as to the duty of the Court in construing a will containing technical words, see, further, *per* Lord Westbury, C., *Young* v. *Robertson*, 4 Macq. Sc. App. Cas. 325; distinguished in *Richardson* v. *Power*, 19 C. B. N. S. 798; *Ralston* v. *Hamilton*, 4 Macq. Sc. App. Cas. 397; *Jenkins* v. *Hughes*, 8 H. L. Cas. 571.

(*c*) *Per* Knight Bruce, V.-C., *Early* v. *Benbow*, 2 Coll. 353.

"Children."

The following instances may serve to illustrate the above remarks (*d*) :—If a testator leaves his property to be divided amongst his "children," which is a word bearing a strict technical meaning in law, the Court would at once construe "children" as meaning children born in wedlock; and if there were any such children to whom that term could be applied, the bequest would be limited to them, although it might also appear that the testator had other children born out of wedlock: and no evidence would be admissible to show that he intended that his property should be equally distributed amongst all his children, whether legitimate or illegitimate. But if, upon the evidence, it should appear that the testator never was married, so that it was impossible to apply the language of his will in its strict and primary sense, and if it further appeared that he had illegitimate children whom he had always treated as his children, such evidence, and any other that would tend to prove that these were the intended objects of his bounty, might be used for the purpose of construing the bequest according to the less strict and technical meaning of the term "children," so as to give effect to the bequest of the testator, which would otherwise be wholly inoperative (*e*).

In like manner, where a bequest is made to the "children" or "issue" of A. B., the whole context of the will must be considered, in endeavouring to ascertain the proper effect to be attributed to the word "children" or "issue." It may be, that the word "children," must be

(*d*) As to the meaning of the word "unmarried," see *Clarke* v. *Colls*, 9 H. L. Cas. 601,—of the words "eldest male lineal descendant," *Thellusson* v. *Lord Rendlesham*, 7 H. L. Cas. 429.

(*e*) *Per* Erskine, J., *Shore* v. *Wilson*, 5 *Scott*, N. R. 990. See Sir James Wigram's Treatise on Extr. Evid., 3rd ed., 43, 58.

enlarged and construed to mean "issue" generally, or the word "issue" restricted so as to mean "children," and each case must depend on the peculiar expressions used, and the structure of the sentences (*f*). When, however, the context is doubtful, the Court, so far as it can, will prefer that construction which will most benefit the testator's family generally, on the supposition that such a construction must most nearly correspond with his intention (*g*).

Lastly, in determining whether an estate-tail or a life estate only passes under the words of a given testamentary instrument, the same general rule of interpretation above considered is applicable, and has thus been forcibly stated and illustrated by Lord *Brougham*, who observes—"I take the principle of construction, as consonant to reason and established by authority, to be this—that, where by plain words, in themselves liable to no doubt, an estate-tail is given, you are not to allow such estate to be altered and cut down to a life estate, unless there are other words which plainly show the testator to have used the former as words of purchase contrary to their natural or ordinary sense, or unless in the rest of the provisions there be some plain indication of a general intent inconsistent with an estate-tail being given by the words in question, and which general intent can only be fulfilled by sacrificing

(*f*) Also, where in a devise there is a gift over on general failure of "issue," the word "issue" must, *primâ facie*, be understood to mean "heirs of the body," unless from the context it clearly appear that the testator intended to give it a different meaning; *Roddy* v. *Fitzgerald*, 6 H. L. Cas. 823. See *Bradley* v. *Cartwright*, L. R. 2 C. P. 511; *Eastwood* v. *Avison*, L. R. 4 Ex. 141; *per* Lord Chelmsford, C., *Williams* v. *Lewis*, 6 H. L. Cas. 1021.

(*g*) *Per* Lord Langdale, M.R., *Farrant* v. *Nichols*, 9 Beav. 329, 330; *Slater* v. *Dangerfield*, 15 M. & W. 263; *Richards* v. *Davies*, 13 C. B. N. S. 69.

the particular provisions, and regarding the expressions as words of purchase. Thus, if there is a gift first to A. and the heirs of his body, and then, in continuation, the testator, referring to what he had said, plainly tells us, that he used the words, 'heirs of the body' to denote A.'s first and other sons, then, clearly, the first taker would only take a life estate. So, again, if a limitation is made afterwards, and is clearly the main object of the will, which never can take effect unless an estate for life be given instead of an estate-tail: here, again, the first words become qualified, and bend to the general intent of the testator, and are no longer regarded as words of limitation, which, if standing by themselves, they would have been" (*h*).

To the general maxims of construction applicable to wills, viz., *Benignè faciendæ sunt interpretationes et verba intentioni debent inservire*, the doctrine of cy-près is referable (*i*). According to this doctrine, which proceeds upon the principle of carrying into effect as far and as nearly as possible the intention of the testator, if there be a general and also a particular intention apparent on the will, and the particular intention cannot take effect, the words shall be so construed as to give effect to the general intention (*k*). Thus, where the devise was to the second son of W. N. (who at the death of the testator had no son) for his life, and after his death, or in case he should inherit the paternal estate by the death of his elder

(*h*) *Fetherston* v. *Fetherston*, 3 Cl. & Fin. 75, 76; *per* Lord Brougham, C., *Thornhill* v. *Hall*, 2 Cl. & Fin. 36.

(*i*) See *per* Lord St. Leonards, *East* v. *Twyford*, 4 H. L. Cas. 556.

(*k*) *Per* Buller, J., *Robinson* v. *Hardcastle*, 2 T. R. 254; Shep. Touch. 87. The rule as to cy-près is stated, *per* Lord St. Leonards, C., *Monypenny* v. *Dering*, 2 De G. M. & G. 173. See, *per* Lord Kenyon, C.J., *Brudenell* v. *Elwes*, 1 East, 451.

brother, to his second son lawfully to be begotten and his heirs male; remainder to the third and other sons of W. N. successively in tail male. Held, that the estate vested in the second son of W. N. (when born) by executory devise for an estate in tail male, determinable on the accession of the paternal estate (*l*). So in the case of a condition precedent annexed to a legacy, with which a literal compliance becomes impossible from unavoidable circumstances, and without any default of the legatee; or where a bequest is made for charitable purposes, with which a literal compliance becomes inexpedient or impracticable: in such cases a court of equity will apply the doctrine of cy-près, and will endeavour substantially, and as nearly as possible, to carry into effect the intention of the testator (*m*).

Cy-près when inapplicable.

It is to be observed that the doctrine of cy-près does not apply to limitations of personal estate, nor of a mixed fund (*n*). It is also inapplicable where an attempt is made to limit a succession of life estates to the issue of an unborn person either for a definite or indefinite series of generations; and also where the limitation to the children of the unborn person gives them an estate in fee simple (*o*).

Summary of preceding remarks.

The remarks above made, and authorities referred to, will serve to give a general view of the mode of

(*l*) *Nicholl* v. *Nicholl*, 2 W. Bl. 1159. See, however, *Monypenny* v. *Dering*, 16 M. & W. 418; 2 M. & G. 145.

(*m*) 1 Story, Eq. Jurisp., 12th ed., 1169–80, where this doctrine is considered; 1 Jarm. Wills, 4th ed., 243; *Ironmongers Co.* v. *A.-G.*, 10 Cl. & Fin. 908; *Mills* v. *Farmer*, 19 Ves. 483. The entire doctrine of equity with regard to trusts, and especially such as are raised in a will by precatory words, will at once occur to the reader as fraught with illustrations of the maxims commented on in the text.

(*n*) *Boughton* v. *James*, 1 Coll. 1 H. L. Ca. 406.

(*o*) Jarman on Wills, 4th ed., Vol. I. 301.

applying to the interpretation of wills those very comprehensive maxims which we have been endeavouring to illustrate and explain, and which are, indeed, comprised in the well-known saying,—*Ultima voluntas testatoris est perimplenda secundum veram intentionem suam* (*p*).

We shall, therefore sum up this part of our subject with observing that the only safe course to pursue in construing a will is to look carefully for the intention of the testator as it is to be derived from the words employed by him within the whole of the will, regardless alike of any general surmise or conjecture from without the will, as of any legal consequences annexed to the estate itself, when such estate is discovered within the will (*q*); bearing in mind, however, that where technical rules have become established, such rules must be followed, although opposed to the testator's presumable and probable intention—that where technical expressions occur they must receive their legal meaning, unless, from a perusal of the entire instrument, it be evident that the testator employed them in their popular signification—that words which have no technical meaning shall be understood in their usual and ordinary sense, if the context do not manifestly point to any other (*r*)—that where the particular intention of the testator cannot literally be performed, effect will, in many cases, be given to the general intention, in order that his wishes may be carried out as nearly as possible, and *ut res magis valeat quàm pereat;* and lastly, that where, by acting on one interpretation of the words used, it would make the testator act

(*p*) Co. Litt. 322. b.

(*q*) Judgm., 3 A. & E. 964.

(*r*) The question as to what will pass under the word "portrait" in a will is elaborately discussed, *Duke of Leeds* v. *Earl Amherst*, 9 Jur. 359; S. C., 13 Sim. 459.

capriciously without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, then, if the language admits of two constructions, that construction may reasonably and properly be adopted which avoids those anomalies, even though that construction be not the most obvious or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which may be considered capricious or even harsh and unreasonable (*s*).

Analogous principles of the Roman law.

It may not be uninteresting further to remark, that the rules laid down in the Roman law upon the subject under consideration, are almost identical with those above stated, as recognized by our own jurists at the present day. Where, for instance, ambiguous expressions occurred, the rule was, that the intention of him who used them should especially be regarded,—*In ambiguis orationibus maximè sententia spectanda est ejus qui eas protulisset* (*t*), a rule which we learn was confined to the interpretation of wills wherein one person only speaks, and was not applicable to agreements generally, in which the intention of both the contracting parties was necessarily to be considered (*u*); and, accordingly in another passage in the Digest, we find the same rule so expressly qualified and restricted—*Cum in testamento ambigue aut etiam perperam scriptum est benigne interpretari et secundum id quod credibile est cogitatum credendum est* (*x*)—where an ambiguous, or even an erro-

(*s*) *Abbott* v. *Middleton*, 7 H. L. Cas. 89; *Bathurst* v. *Errington*, 4 Ch. D. 251; 2 App. Cas. 698; 46 L. J. Ch. 748.

(*t*) D. 50. 17. 96.

(*u*) Wood, Inst. 107.

(*x*) D. 34. 5. 24; *vide* Brisson. ad. verb. "*Perperam*;" Pothier ad Pand. (ed. 1819), vol. 3, p. 46, where examples of this rule are collected.

neous expression occurs in a will, it should be construed liberally, and in accordance with the testator's probable meaning. In like manner we find it stated, that a departure from the literal meaning of the words used is not justifiable, unless it be clear that the testator himself intended something different therefrom:—*Non alitur a significatione verborum recedi oportet quàm cum manifestum est aliud sensisse testatorem* (*y*); and, lastly, we find the general principle of interpretation to which we have already adverted thus concisely worded—*In testamentis plenius voluntates testantium interpretantur* (*z*), that is to say, a will shall receive a more liberal construction than its strict meaning, if alone considered, would permit (*a*).

Construction of statutes.

The construction of a statute, like the operation of a devise, depends upon the apparent intention of the maker, to be collected either from the particular provision or the general context, though not from any general inferences drawn merely from the nature of the objects dealt with by the statute (*b*). Acts of Parliament and wills ought to be alike construed according to the intention of the parties who made them (*c*); and the preceding

(*y*) D. 32. 69. pr. applied *per* Knight Bruce, L. J., 2 De G., M. & G. 313.

(*z*) D. 50. 17. 12.

(*a*) Cujac. *ad loc.*, cited 3 Pothier ad Pand. 46.

(*b*) *Fordyce* v. *Bridges*, 1 H. L. Cas. 1. Where a *casus omissus* occurred in a statute, the doctrine of cy-près was applied, *Smith* v. *Wedderburne*, 16 M. & W. 104. See *Salkeld* v. *Johnson*, 2 C. B. 757.

(*c*) It is said, that a will is to be favourably construed, because the testator is *inops consilii*: "This," observed Lord Tenterden, "we cannot say of the legislature, but we may say that it is *magnas inter opes inops*." 9 B. & C. 752, 753.

See the remarks of Wood, V.-C., as to determining whether a mandatory enactment is to be considered directory only, or obligatory with an implied nullification for disobedience, *Liverpool Borough Bank* v. *Turner*, 29 L. J., Chanc., 827; S. C., 30 *Id.* 379, approved in *Ward* v. *Beck*, 13 C. B. N. S. 675-6.

remarks as to the construction of deeds and testamentary instruments will, therefore, in general, hold good with reference to the construction of statutes, the great object being to discover the true intention of the legislature; and where that intention can be indubitably ascertained, the Courts are bound to give it effect, whatever may be their opinion of its wisdom or policy (*d*); "acting upon the rule as to giving effect to all the words of the statute, a rule universally applicable to all writings, and which ought not to be departed from, except upon very clear and strong grounds" (*e*).

"The general rule," as observed by *Byles*, J. (*f*), "for the construction of Acts of Parliament is, that the words are to be read in their popular, natural, and ordinary sense, giving them a meaning to their full extent and capacity, unless there is reason upon their face to believe that they were not intended to bear that construction, because of some inconvenience which could not have been absent from the mind of the framers of the Act, which must arise from the giving them such large sense."

And again—"In construing an Act of Parliament, when the intention of the legislature is not clear, we must adhere to the natural import of the words; but when it is clear what the legislature intended, we are bound to give effect to it notwithstanding some apparent deficiency in the language used" (*g*).

(*d*) See the analogous remarks of Lord Brougham, with reference more particularly to the common law, in *Reg.* v. *Millis*, 10 Cl. & Fin. 749; also, *per* Vaughan, J., 9 A. & E. 980; Judgm., *Fellowes* v. *Clay*, 4 Q. B. 349; *per* Alexander, C.B., 2 Yo. & J. 215.

(*e*) Judgm., 8 Exch. 860.

(*f*) *Birks*, app., *Allison*, resp., 13 C. B. N. S. 23.

(*g*) *Per* Pollock, C.B., *Huxham* v. *Wheeler*, 3 H. & C. 80. See also *Rothes* v. *Kirkcaldy Waterworks Commissioners*, 7 App. Cas. 702.

Hence, although the general proposition be undisputed that "an affirmative statute giving a new right, does not of itself and of necessity destroy a previously existing right," it will nevertheless have such effect, "if the apparent intention of the legislature is that the two rights should not exist together" (*h*).

Construction of penal statutes.

A remedial statute, therefore, shall be liberally construed, so as to include cases which are within the mischief which the statute was intended to remedy (*i*); whilst, on the other hand, where the intention of the legislature is doubtful, the inclination of the Court will always be against that construction which imposes a burthen (*k*), tax (*l*), or duty (*m*), on the subject. It has been designated as a "great rule" in the construction of fiscal laws, "that they are not to be extended by any laboured

(*h*) *Per* Lord Cranworth, C., *O'Flaherty* v. *M'Dowell*, 6 H. L. Cas. 157. See *Ex parte Warrington*, 3 De G., M. & G. 159.

(*i*) See *Twyne's case*, 3 Rep. 80.

(*k*) *Per* Lord Brougham, *Stockton and Darlington R. C.* v. *Barrett*, 11 Cl. & Fin. 607; *per* Parke, B., *Ryder* v. *Mills*, 3 Exch. 869, and in *Wroughton* v. *Turtle*, 11 M. & W. 567. "All acts which restrain the common law ought themselves to be restrained by exposition:" *Ash* v. *Abdy*, 3 Swanst. 664. Mere permissive words shall not abridge a common law right, *Ex parte Clayton*, 1 Russ. & My. 372; *per* Erle, C.J., *Caswell*, app., *Cook*, resp. 11 C. B. N. S. 652.

(*l*) *Per* Parke, B., *Re Mickle-thwait*, 11 Exch. 456 (cited Arg. 2 H. & N. 373), and in *A.-G.* v. *Bradbury*, 7 Exch. 116, citing *Denn* v. *Diamond*, 4 B. & C. 243; *Mayor of London* v. *Parkinson*, 10 C. B. 228; Judgm., *Vauxhall Bridge Co.* v. *Sawyer*, 6 Exch. 509.

(*m*) Judgm., *Marquis of Chandos* v. *Commissioners of Inland Revenue*, 6 Exch. 479; *per* Wilde, C.J., 5 C. B. 135. See *per* Bramwell, B., *Foley* v. *Fletcher*, 3 H. & N. 781–2.

"Acts of Parliament, however, imposing stamp duties ought to be construed according to the plain and ordinary meaning of the words used:" Judgm., *Lord Foley* v. *Commissioners of Inland Revenue*, L. R. 3 Ex. 268.

If a statute imposing a toll contain also exemptions from it in favour of the crown and of the public, any clause so exempting from toll is "to have a fair, reasonable, and not strict construction:" *per* Byles, J., *Toomer* v. *Reeves*, L. R. 3 C. P. 66.

construction, but that you must adhere to the strict rule of interpretation; and if a person who is subjected to a duty in a particular character or by virtue of a particular description no longer fills that character, or answers that description, the duty no longer attaches upon him, and cannot be levied" (*n*). A penalty, moreover, must be imposed by clear words (*o*). The words of a penal statute (*p*) shall be restrained for the benefit of him against whom the penalty is inflicted, and the language of the statute must be strictly looked at in order to see whether the person against whom the penalty is sought to be enforced has committed an offence within it (*q*).

"The principle," remarked Lord *Abinger*, C. B., "adopted by Lord Tenterden (*r*), that a penal law ought to be construed strictly, is not only a sound one, but the only one consistent with our free institutions. The interpretation of statutes has always in modern times been

(*n*) *Per* Lord Westbury, C., *Dickson* v. *Reg.* 11 H. L. Cas. 184.

(*o*) *Per* Alderson, B., *Woolley* v. *Kay*, 1 H. & N. 309; Judgm., *Ryder* v. *Mills*, 3 Exch. 869, *et seq.*; *Coe* v. *Lawrance*, 1 E. & B. 516, 520; *Archer* v. *James*, 2 B. & S. 61, 103.

(*p*) In *A.-G.* v. *Sillem*, 2 H. & C. 431, the method of construing a penal statute was much considered, and there (*Id.* 530) Bramwell, B., says, "The law that governs this case is a written law, an Act of Parliament, which we must apply acording to the true meaning of the *words* used in it. We must not extend it to anything not within the natural meaning of those words, but within the mischief or supposed mischief intended to be prevented, nor must we refuse to apply it to what is within that natural meaning, because not, or supposed nót to be within the mischief:" see also *per* Pollock, C.B., *Id.* 509.

"I suppose 'within the equity' means the same thing as 'within the mischief' of the statute:" *per* Byles, J., *Shuttleworth* v. *Le Fleming*, 19 C. B. N. S. 703.

(*q*) *Per* Field, J., *Graff* v. *Evans*, 8 Q. B. D. 373; 51 L. J. M. C. 25.

(*r*) See *Proctor* v. *Mainwaring*, 3 B. & Ald. 145.

highly favourable to the personal liberty of the subject, and I hope will always remain so" (*s*).

This rule, however, which is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative and not in the judicial department, must not be so applied as to narrow the words of the statute to the exclusion of cases which those words in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend (*t*).

Preamble.

We may add, in connection with this part of the subject, that although the enacting words of a statute are not necessarily to be limited or controlled by the words of the preamble, but in many instances go beyond it, yet, on a sound construction of every Act of Parliament, the words in the enacting part must be confined to that which is the plain object and general intention of the legislature in passing the Act; and the preamble affords a good clue to discover what that object was (*u*). "The only rule," it has been said, "for the construction of Acts of Parliament

(*s*) *Per* Lord Abinger, C.B., *Henderson* v. *Sherborn*, 2 M. & W. 236; Judgm., *Fletcher* v. *Calthrop*, 6 Q. B. 887; cited and adopted, *Murray* v. *Reg.*, 7 Q. B. 707.

(*t*) See Judgm., *United States* v. *Wiltberger*, 5 Wheaton (U.S.), R. 95; *per* Pollock, C.B., 3 H. & N. 812.

(*u*) *Per* Lord Tenterden, C.J., *Halton* v. *Cave*, 1 B. & Ad. 538; Judgm., *Salkeld* v. *Johnson*, 2 Exch. 283, and cases there cited; *per* Kelly, C.B., *Winn* v. *Mossman*, L. R. 4 Ex. 300; *Carr* v. *Royal Exchange Ass. Co.*, 1 B. & S. 956; *per* Maule, J., *Edwards* v. *Hodges*, 15 C. B. 484, citing, *per* Lord Cowper, C., *Copeman* v. *Gallant*, 1 P. Wms. 314; *per* Coleridge, J., *Pocock* v. *Pickering*, 18 Q. B. 797, 798; Co. Litt. 79. a.; *per* Buller, J., *Crespigny* v. *Wittenoom*, 4 T. R. 793; Arg., *Skinner* v. *Lambert*, 5 Scott, N. R., 206; and cases cited in *Whitmore* v. *Robertson*, 8 M. & W. 472; *Stockton and Darlington R. C.* v. *Barrett*, 11 Cl. & Fin. 590; Arg., *Sterry* v. *Clifton*, 9 C. B. 110.

is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound the words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice *Dyer* (*x*), is a 'key to open the minds of the makers of the Act, and the mischiefs which they intended to redress'" (*y*).

Headings and Recitals.

The heading of a portion of a statute may, it would seem, be referred to to determine the sense of any doubtful expression in a section ranged under it (*z*); and a recital of an Act of Parliament, stating its object, has been held to limit general words in the enacting part to the object as declared in the recital (*a*).

(*x*) Plowd. 369.

(*y*) *Per* Tindal, C.J., delivering the opinion of the Judges in *The Sussex Peerage*, 11 Cl. & Fin. 143.

See further as to the office of the preamble, *per* Buller, J., *R.* v. *Robinson*, 2 East, P. C. 1113, cited *R.* v. *Johnson*, 29 St. Tr. 303.

The *title* of a statute "is certainly no part of the law, and in strictness ought not to be taken into consideration at all:" Judgm., *Salkeld* v. *Johnson*, 2 Exch. 283, and cases there cited. See 8 H. L. Cas. 603 (*k*); *per* Willes, J., *Claydon* v. *Green*, L. R. 3 C. P. 522.

The marginal note to a section of a statute in the copy printed by the queen's printer, forms no part of the statute itself, and does not bind as explaining or construing the section. *Claydon* v. *Green*, L. R. 3 C. P. 511, 522, followed in *Sutton* v. *Sutton*, 22 Ch. Div. 521; 52 L. J. Ch. 334, dissenting from *Venour* v. *Sellon*, 2 Ch. D. 522.

(*z*) *Hammersmith Railway Co.* v. *Brand*, L. R. 4 H. L. Cas. 171. See *Eastern Counties R. Co.* v. *Marriage*, 9 H. L. Cas. 32.

(*a*) *Howard* v. *Earl of Shrews-*

The golden rule for construing wills, statutes, and, in fact, all written instruments has been thus stated: "The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further" (*b*). The "golden rule" must, however, be applied with much caution. "If," remarked the late Chief Justice *Jervis* (*c*), "the precise words used are plain and unambiguous in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied, where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning." The "golden rule."

It may then safely be stated as an establishsd rule of construction, that an Act of Parliament should be read according to the ordinary and grammatical sense of the words (*d*), unless, being so read, it would be absurd or Meaning of words.

bury, L. R. 17 Eq. 378; 34 L. J. Ch. 495.

(*b*) *Grey* v. *Pearson*, 6 H. L. Cas. 61, 106; cited with approval, *Caledonian Railway Co.* v. *North British Railway Co.*, 6 App. Cas. 114, 131; 29 W. R. 685.

(*c*) 11 C. B. 391; *per* Pollock, C.B., 9 Exch. 475. See *Woodward* v. *Watts*, 2 E. & B. 457.

(*d*) "It is a good rule, in the construction of Acts of Parliament, that the Judges are not to make the law what they may think reasonable, but to expound it according to the common sense of its words:" *per* Cresswell, J., *Biffin* v. *Yorke*, 6 Scott, N. R., 235; *Richards* v. *M'Bride*, 8 Q. B. D. 119; 51 L. J. M. C. 15. See also, Judgm., *R.* v. *Hall*, 1 B. & C.

inconsistent with the declared intention of the legislature, to be collected from the rest of the Act (*e*), or unless a uniform series of decisions has already established a particular construction (*f*), or unless terms of art are used which have a fixed technical signification: as, for instance, the expression "heirs of the body," which conveys to lawyers a precise idea, as comprising in a legal sense only certain lineal descendants; and this expression shall, therefore, be construed according to its known meaning (*g*).

It is also a rule of the civil law adopted by Lord *Bacon*, which was evidently dictated by common sense, and is in accordance with the spirit of the maxim which we have been considering, that, where obscurities, ambiguities, or faults of expression render the meaning of an enactment doubtful, that interpretation shall be preferred which is most consonant to equity, especially where it is in conformity with the general design of the legislature. *In ambiguâ voce legis ea potius accipienda est significatio quæ vitio caret, præsertim cum etiam voluntas legis ex hoc colligi possit* (*h*). And, according to a recent case, if the Act is ambiguous, and upon one construction the balance of hardship or inconvenience seems to be strongly against

123; cited 2 C. B. 66; and in *The Lion*, L. R. 2 P. C. 530; *Stracey* v. *Nelson*, 12 M. & W. 541; *United States* v. *Fisher*, 2 Cranch. (U. S.), R. 286; cited 7 Wheaton (U. S.), R. 169.

(*e*) Judgm., *Smith* v. *Bell*, 10 M. & W. 389; *Turner* v. *Sheffield R. C.*, *Id.* 434; Judgm., *Steward* v. *Greaves*, 10 M. & W. 719; *per* Alderson, B., *A.-G.* v. *Lockwood*, 9 M. & W. 398; Judgm., *Hyde* v. *Johnson*, 2 Bing., N. C. 780.

(*f*) *Per* Parke, B., *Doe* d. *Ellis* v. *Owens*, 10 M. & W. 521; *per* Lord Brougham, C., *The Earl of Waterford's Peerage*, 6 Cl. & Fin. 172.

(*g*) 2 Dwarr. Stats. 702; *Poole* v. *Poole*, 3 B. & P. 620.

(*h*) D. 1. 3. 19; Bac., Max., reg. 3.

the public, the balance of inconvenience may be considered in determining the question of construction (*i*).

EX ANTECEDENTIBUS ET CONSEQUENTIBUS FIT OPTIMA INTERPRETATIO. (2 *Inst.* 173.)—*A passage will be best interpreted by reference to that which precedes and follows it.*

It is a true and important rule of construction, that the sense and meaning of the parties to any particular instrument should be collected *ex antecedentibus et consequentibus;* that is to say, every part of it should be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done (*k*); or, in other words, the construction must be made upon the entire instrument, and not merely upon disjointed parts of it (*l*); the whole context must be considered, in endeavouring to collect the intention of the parties, although the immediate object of inquiry be the meaning of an isolated clause (*m*). In short, the law will judge of a deed, or other instrument, consisting of divers parts or clauses, by looking at the whole; and will give to each Rule.

(*i*) *Dixon* v. *Caledonian Co.*, 5 App. Cas. 827; 43 L. T. 513.

(*k*) *Per* Lord Ellenborough, C.J., *Barton* v. *Fitzgerald*, 15 East, 541; Shep. Touch. 87; *per* Hobart, C.J., Winch. 93. See *Micklethwait* v. *Micklethwait*, 4 C. B. N. S. 790, 862.

(*l*) *Lord North* v. *Bishop of Ely*, cited 1 Bulst. 101; and Judgm., *Doe* d. *Meyrick* v. *Meyrick*, 2 Cr. & J. 230; *Maitland* v. *Mackinnon*, 1 H. & C. 607.

(*m*) *Coles* v. *Hulme*, 8 B. & C. 568; Hobart, 275; cited *Gale* v. *Reed*, 8 East, 79.

part its proper office, so as to ascertain and carry out the intention of the parties (*n*).

Examples.

Thus, in the case of a bond with a condition, the latter may be read and taken into consideration, in order to correct and explain the obligatory part of the instrument (*o*). So, in construing an agreement in the form of a bond in which a surety becomes liable for the due fulfilment of an agent's duties therein particularly enumerated, a general clause in the obligatory part of the bond must be interpreted strictly, and controlled by reference to the prior clauses specifying the extent of the agency (*p*). On the same principle, the recital in a deed or agreement may be looked at in order to ascertain the meaning of the parties, and is often highly important for that purpose (*q*): and the general words of a subsequent distinct clause or stipulation may often be explained or qualified by the matter recited (*r*). Where, indeed, "the words in the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals or other parts of the deed." But where, on the other hand, "those words are of doubtful meaning, the recitals and other parts of the deed may be used as a test to discover the intention of the parties, and to fix

(*n*) See Hobart, 275; *Doe* d. *Marquis of Bute* v. *Guest*, 15 M. & W. 160.

(*o*) *Coles* v. *Hulme*, 8 B. & C. 568; and cases cited, *Id.* 574, n. (*a*).

(*p*) *Napier* v. *Bruce*, 8 Cl. & Fin. 470.

(*q*) Shep. Touch. 76; *The Marquis of Cholmondeley* v. *Lord Clinton*, 2 B. & Ald. 625; S. C., 4 Bligh, 1.

(*r*) *Payler* v. *Homersham*, 4 M. & S. 423; cited in *Harrison* v. *Blackburn*, 17 C. B. N. S. 691; *Simons* v. *Johnson*, 3 B. & Ad. 180; *Boyes* v. *Bluck*, 13 C. B. 652; *Solly* v. *Forbes*, 2 B. & B. 38; *Charleton* v. *Spencer*, 3 Q. B. 693; *Sampson* v. *Easterby*, 9 B. & C. 505; S. C. (affirmed in error), 1 Cr. & J. 105; *Price* v. *Barker*, 4 E. & B. 760, 777; *Henderson* v. *Stobart*, 5 Exch. 99.

the true meaning of those words" (*s*). So, covenants are to be construed according to the obvious intention of the parties, as collected from the whole context of the instrument containing them, and according to the reasonable sense of the words; and, in conformity with the rule above laid down, a covenant in large and general terms has frequently been narrowed and restrained (*t*), where there has appeared something to connect it with a restrictive covenant, or where there have been words in the covenant itself amounting to a qualification (*u*): and it has, indeed, been said, in accordance with the above rule, that, "however general the words of a covenant may be, if standing alone, yet, if from other covenants in the same deed, it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the Court will limit the operation of the general words" (*x*).

It is, moreover, as a general proposition, immaterial in what part of a deed any particular covenant is inserted (*y*); for the construction of a deed does not depend on the order of the covenants, or upon the precise terms of them; but regard must be had to the object, and the whole scope of the instrument (*z*). For instance, in the

(*s*) Judgm., *Walsh* v. *Trevanion*, 15 Q. B. 751.

(*t*) *Per* Lord Ellenborough, C.J., *Iggulden* v. *May*, 7 East, 241; Plowd. 329; *Cage* v. *Paxton*, 1 Leon. 116; *Broughton* v. *Conway*, Moor, 58; *Gale* v. *Reed*, 8 East, 89; *Sicklemore* v. *Thisleton*, 6 M. & S. 9; cited, *Jowett* v. *Spencer*, 15 M. & W. 662; *Hesse* v. *Stevenson*, 3 B. & P. 365. See *Doe* v. *Godwin*, 4 M. & S. 265.

(*u*) Judgm., *Smith* v. *Compton*, 3 B. & Ad. 200.

(*x*) Judgm., *Hesse* v. *Stevenson*, 3 B. & P. 574. See the maxim as to *verba generalia*, *post*.

(*y*) *Per* Buller, J., 5 T. R. 526; 1 Wms. Saund. 60, n. (*l*).

(*z*) *Per* Wilde, C.J., *Richards* v. *Bluck*, 6 C. B. 441.

indenture of lease of a colliery, two lessees covenanted "jointly and severally in manner following;" and then followed a number of covenants as to working the colliery; after which was a covenant, that the moneys appearing to be due should be accounted for, and paid by the lessees, their executors, &c., not saying, "and each of them:" it was held, that the general words at the beginning of the covenants by the lessees extended to all the subsequent covenants thoughout the deed on the part of the lessees, there not being anything in the nature of the subject to restrain the operation of those words to the former part only of the lease (*a*).

Again, words may be transposed, if it be necessary to do so in order to give effect to the evident intent of the parties (*b*); as, if a lease for years be made in February, rendering a yearly rent payable at Michaelmas-day and Lady-day during the term, the law will make a transposition of the feasts, and read it thus, "at Lady-day and Michaelmas-day," in order that the rent may be paid yearly during the term. And so it is in the case of an annuity (*c*). And, although courts of law have no power to alter the words, or to insert words which are not in the deed, yet they may and ought to construe the words in a manner most agreeable to the meaning of the grantor, and may reject any words that are merely insensible (*d*). Likewise, if there be two clauses or parts of a deed (*e*) repugnant the one to the other, the former shall be received, and the latter rejected, unless there be some special reason

(*a*) *Duke of Northumberland* v. *Errington*, 5 T. R. 522; *Copland* v. *Laporte*, 3 A. & E. 517.

(*b*) *Parkhurst* v. *Smith*, Willes, R. 332; S. C., 3 Atk. 135.

(*c*) Co. Litt. 217. b.

(*d*) *Per* Willes, C.J., 3 Atk. 136; S. C., Willes, R. 332; Savile, 71.

(*e*) *Secus* of a will, see p. 538.

to the contrary (*f*); for instance, in a grant, if words of restriction are added which are repugnant to the grant, the restrictive words must be rejected (*g*).

It seems, however, to be a true rule, that this rejection of repugnant matter can be made in those cases only where there is a full and intelligible contract left to operate after the repugnant matter is excluded; otherwise, the whole contract, or such parts of it as are defective, will be pronounced void for uncertainty (*h*). And as already observed, "if a deed can operate two ways, one consistent with the intent, and the other repugnant to it, the Courts will be ever astute so to construe it, as to give effect to the intent," and the construction must be made on the entire deed (*i*).

A marriage settlement recited that it was the intention of the parties to settle a rent-charge or annuity of 1,000*l.* per annum on the intended wife, in case she should survive her husband. In the body of the deed the words used were "1,000*l.* sterling lawful money of Ireland." It was held that the words "of Ireland" must be excluded, for the expression could have no meaning, unless some of the words were rejected, and it is a rule of law, that, if the first words used would give a meaning, the latter words

(*f*) Shep. Touch. 88; Hardr. 94; *Walker* v. *Giles*, 6 C. B. 662, cited, *In re Royal Liver Friendly Society*, L. R. 5 Ex. 80.

(*g*) Hobart, 172; *Mills* v. *Wright*, 1 Freem. 247.

(*h*) 2 Anderson, R. 103. In *Doe* d. *Wyndham* v. *Carew*, 2 Q. B. 317, a proviso in a lease was held to be insensible. In *Youde* v. *Jones*, 13 M. & W. 534, an exception introduced into a deed of appointment under a power was held to be repugnant and void. See, also, *Furnivall* v. *Coombes*, 6 Scott, N. R., 522; cited in *Kelner* v. *Baxter*, L. R. 2 C. P. 186; *White* v. *Hancock*, 2 C. B. 830. In *Scott* v. *Avery*, 8 Exch. 487; S. C., 5 H. L. Cas. 811, various authorities having reference to repugnant stipulations in contracts are cited.

(*i*) *Per* Turner, V.-C., *Squire* v. *Ford*, 8 Hare, 57.

must be excluded (*j*). So, we read that, if one makes a lease for ten years "at the will of the lessor," this is a good lease for ten years certain, and the last words are void for the repugnancy (*k*). And without multiplying examples to a like effect, the result of the authorities seems to be that "when a court of law can clearly collect from the language within the four corners of a deed or instrument in writing the real intention of the parties, they are bound to give effect to it by supplying anything necessarily to be inferred from the terms used, and by rejecting as superfluous whatever is repugnant to the intention so discerned" (*l*).

Where, however, two clauses or gifts in a will are irreconcilable, so that they cannot possibly stand together, the clause or gift which is posterior in position shall prevail, the subsequent words being considered to denote a subsequent intention: *Cum duo inter se pugnantia reperiuntur in testamento ultimum ratum est* (*m*). It is well settled that where there are two repugnant clauses in a will, the last shall prevail, as being most indicative of the intent (*n*), and this results from the general rule of construction; for, unless the principle were recognized of adopting one and rejecting the other of two repugnant clauses, both would be necessarily void, each having the effect of neutralising and frustrating the other (*o*). There-

(*j*) *Cope* v. *Cope*, 15 Sim. 118.

(*k*) Bac. Abr., tit. Leases and Terms for Years, L. 3, cited and distinguished in *Morton* v. *Woods*, L. R. 4 Q. B. 305.

(*l*) *Per* Kelly, C.B., *Gwyn* v. *Neath Canal Co.*, L. R. 3 Ex. 215, where the functions of a court of equity in reforming an instrument are also considered.

(*m*) Co. Litt. 112. b.

(*n*) 16 Johns. (U.S.), R. 546.

(*o*) 1 Jarm., Wills, 4th ed., 472–3. Also, words and passages in a will, which cannot be reconciled with the general context, may be rejected.

fore, if a testator, in one part of his will, gives to a person an estate of inheritance in land, or an absolute interest in personalty, and in subsequent passages unequivocally shows that he means the devisee or legatee to take a life-interest only, the prior gift is restricted accordingly (*p*).

The maxim last mentioned must, however, in its application, be restricted by, and made subservient to, that general principle, which requires that the testator's intention shall, if possible, be ascertained and carried into effect (*q*).

Interpretation of statutes.

Lastly, it is an established rule, in construing a statute that the intention of the law-giver and the meaning of the law are to be ascertained by viewing the whole and every part of the Act. One part of a statute must be so construed by another that the whole may, if possible, stand (*r*); and that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant; and it is a sound general principle, in the exposition of statutes, that less regard is to be paid to the words used than to the policy which dictated the Act; as, if land be vested in the King and his heirs by Act of Parliament, saving the right of A., and A. has at that time a lease of it for three years, in this case

Every word should take effect.

(*p*) *Id.* 472. See, also, *Doe* d. *Murch* v. *Marchant*, 7 Scott, N. R. 644.

(*q*) *Morrall* v. *Sutton*, 1 Phill. 545, 546. See *Greenwood* v. *Sutcliffe*, 14 C. B. 226, 235 (*a*); *Plenty* v. *West*, 6 C. B. 201, 219.

(*r*) Thus, in *Fitzgerald's case*, L. R. 5 Ex. 33, Pigott, B., referring to stat. 15 & 16 Vict. c. 57, says, "We must deal with the Act in the ordinary way, that is, put on it a reasonable construction; and if the words are ambiguous we must interpret it *ut res magis valeat quàm pereat.*"

Where the proviso of an Act of Parliament is directly repugnant to the purview, the proviso shall stand and be a repeal of the purview, as it speaks the last intention of the makers: *A.-G.* v. *Chelsea Waterworks Co.*, Fitzgib. 195.

A. shall hold it for his term of three years, and afterwards it shall go to the King; for this interpretation furnishes matter for every clause to work and operate upon (*s*).

Also, if any section be intricate, obscure, or doubtful the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of another (*t*). This, as Sir E. *Coke* observes, is the most natural and genuine method of expounding a statute (*u*); and it is, therefore, a true principle, that *verba posteriora propter certitudinem addita ad priora quæ certitudine indigent sunt referenda* (*x*)—reference should be made to a subsequent section in order to explain a previous clause of which the meaning is doubtful.

We may add, too, that, "Where an Act of Parliament has received a judicial construction putting a certain meaning on its words, and the legislature in a subsequent Act *in pari materiâ* uses the same words, there is a presumption that the legislature used those words intending to express the meaning which it knew had been put upon the same words before; and unless there is something to rebut that presumption, the Act should be so construed, even if the words were such that they might originally have been construed otherwise" (*y*). This principle was recognized and followed by the Court of Appeal in the

(*s*) 1 Com. by Broom & Hadley, 96, 97; Bac Abr., "*Statute*" (I. 2); Arg. *Hine* v. *Reynolds*, 2 Scott, N. R. 419.

(*t*) *Stowell* v. *Lord Zouch*, Plowd. 365; *Doe* d. *Bywater* v. *Brandling*, 7 B. & C. 643.

(*u*) Co. Litt. 381. a.

(*x*) Wing. Max., p. 167; 8 Rep. 236. See 4 Leon R. 248.

(*y*) 11 H. L. Cas. 480–1. *R.* v. *The Poor Law Commissioners* (*St. Pancras*), 6 A. & E. 7. See, also, *per* Parke, B., *Perry* v. *Skinner*, 2 M. & W. 476.

case of *Greaves* v. *Tofield* (*z*), where a landowner by deed charged his land with a life annuity which was never registered under the provisions of 18 & 19 Vict. c. 15, s. 12; he subsequently mortgaged the property to a third person, who took with notice of the annuity: it was held that as the statute 18 & 19 Vict. c. 15, s. 12, was in similar terms to the clauses in the Registry Acts which had been decided not to make an unregistered conveyance void as against a subsequent purchaser who had notice, the legislature must be taken to have used the words in the later Act in the sense given to them by those decisions, and that the annuities, therefore, were valid as against the mortgagee.

NOSCITUR A SOCIIS. (3 *T. R.* 87.)—*The meaning of a word may be ascertained by reference to the meaning of words associated with it* (*a*).

Grammatical rules.

It is a rule laid down by Lord *Bacon*, that *copulatio verborum indicat acceptationem in eodem sensu* (*b*)—the coupling of words together shows that they are to be understood in the same sense. And, where the meaning of any particular word is doubtful or obscure, or where the particular expression when taken singly is inoperative,

(*z*) 14 Ch. Div. 563; 50 L. J. Ch. 119.

(*a*) This, it has been observed, in reference to *King* v. *Melling*, 1 Vent. 225, was a rule adopted by Lord Hale, and was no pedantic or inconsiderate expression when falling from him, but was intended to convey, in short terms, the grounds upon which he formed his judgments. See 3 T. R. 87; 1 B. & C. 644; Arg. 13 East, 531. See, also, *Bishop* v. *Elliott*, 11 Exch. 113; S. C., 10 *Id.* 496, 519, which offers an apt illustration of the maxim *supra*; *Burt* v. *Haslett*, 18 C. B. 162; S. C., *Id.* 893.

(*b*) Bac. Works, vol. 4, p. 26.

the intention of the party who has made use of it may frequently be ascertained and carried into effect by looking at the adjoining words, or at expressions occurring in other parts of the same instrument, for *quæ non valeant singula juncta juvant* (*c*)—words which are ineffective when taken singly operate when taken conjointly: one provision of a deed, or other instrument, must be construed by the bearing it will have upon another (*d*).

It is not proposed to give many examples of the application of the maxim *Noscitur à sociis*, nor to enter at length into a consideration of the very numerous cases which might be cited to illustrate it: it may, in truth, be said to be comprised in those principles which universally obtain, that courts of law and equity will, in construing a written instrument, endeavour to discover and give effect to the intention of the party, and with a view to so doing, will examine carefully every portion of the instrument. The maxim is, moreover, applicable, like other rules of grammar, whenever a construction has to be put upon a will, statute, or agreement; and although difficulty very frequently arises in applying it, yet this results from the particular words used, and from the particular facts existing in each individual case; so that one decision, as to the inference of a person's meaning and intention, can be considered as an express authority to guide a subsequent decision only where the circumstances are similar, and the words are identical or nearly so.

Policy of insurance.

The following instance of the application of the maxim, *Noscitur à sociis*, to a mercantile instrument may be mentioned on account of its importance, and will suffice

(*c*) 2 Bulstr. 132.

(*d*) Arg. *Galley* v. *Barrington*, 2 Bing. 391; *per* Lord Kenyon, C.J., 4 T. R. 227.

to show in what manner the principle which it expresses has been made available for the benefit of commerce. The general words inserted in a maritime policy of insurance after the enumeration of particular perils are as follow:—"and of all perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof." These words, it has been observed, must be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words: they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of this instrument; and this will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated, and occasioned by similar causes; that is to say, the meaning of the general words may be ascertained by referring to the preceding special words (*e*).

Maxim applies in the exposition of wills.

That the exposition of every will must be founded on the whole instrument, and be made *ex antecedentibus et consequentibus*, is, observes Lord *Ellenborough*, one of the most prominent canons of testamentary construction;

(*e*) See Judgm., *Cullen* v. *Butler*, 5 M. & S. 495; cited in *Davidson* v. *Burnand*, L. R. 4 C. P. 117, 120; *West India Telegraph Co.* v. *Home and Colonial Insur. Co.*, 6 Q. B. D. 51; 50 L. J. Q. B. 41; *Lozano* v. *Janson*, 2 E. & E. 160; *Phillips* v. *Barber*, 5 B. & Ald. 161; *Devaux* v. *J'Anson*, 5 B. & C. 519. In *Borradaile* v. *Hunter*, 5 M. & Gr. 639, 667, this maxim is applied by Tindal, C.J. (*diss.* from the rest of the Court), to explain a proviso in a policy of life insurance. In *Clift* v. *Schwabe*, 3 C. B. 437, the same maxim was likewise applied in similar circumstances; see *Dormay* v. *Borradaile*, 5 C. B. 380.

and therefore, in this department of legal investigation, the maxim *Noscitur à sociis* is necessarily of very frequent practical application: yet where between the parts there is no connection by grammatical construction, or by some reference, express or implied, and where there is nothing in the will declarative of some common purpose, from which it may be inferred that the testator meant a similar disposition by such different parts, though he may have varied his phrase or expressed himself imperfectly, the Court cannot go into one part of a will to determine the meaning of another, perfect in itself, and without ambiguity, and not militating with any other provision respecting the same subject-matter, notwithstanding that a more probable disposition for the testator to have made may be collected from such assisted construction. For instance, if a man should devise generally his lands, after payment of his debts and legacies, his trust (*f*) estates would not pass; for, in such case *Noscitur à sociis* what the land is which the testator intended to pass by such devise: it is clear he could only mean lands which he could subject to the payment of his debts and legacies. But, from a testator having given to persons standing in a certain degree of relationship to him a fee-simple in certain land, no conclusion which can be relied on can be drawn, that his intention was to give to other persons standing in the same rank of proximity the same interest in another part of the same land; and where, moreover, the words of the two devises are different, the more natural conclusion is, that, as the testator's expressions are varied, they were altered because his intention in both cases was not the same (*g*).

(*f*) *Roe* d. *Reade* v. *Reade*, 8 T. R. 118.

(*g*) Judgm., *Right* v. *Compton*, 9 East, 272, 273; 11 East, 228; *Hay*

Distinction between the conjunctive and disjunctive illustrated.

In addition to the preceding remarks, a few instances may here conveniently be referred to, illustrating the distinction between the *coniunctive* and the *disjunctive* which it is so essential to observe in construing a testamentary instrument.

A leasehold estate for a long term was devised after the death of A., to B. for life, remainder to his child or children by any woman whom he should marry, and his or their executors, &c., for ever, upon condition, that, in case the said B. should die, "an infant, unmarried, and without issue," the premises should go over to his father and his three other children, share and share alike, and their heirs, executors, &c.:—Held, that the devise over depended upon one contingency, viz., B.'s dying an infant attended with two qualifications, viz., his dying without leaving a wife surviving him, or dying childless; and that the devise over could only take effect in case B. died in his minority, leaving neither wife nor child; and it was observed by Lord *Ellenborough*, in delivering judgment, that, if the condition had been, "if he dies an infant, *or* unmarried, *or* without issue," that is to say, in the disjunctive throughout, the rule would have applied *in disjunctivis sufficit alteram partem esse veram* (*h*); and, consequently, that if B. had died in his infancy, leaving children, the estate would have gone over to B.'s father and his children, to the prejudice of B.'s own issue (*i*).

v. *Earl of Coventry*, 3 T. R. 83; *per* Coltman, J., *Knight* v. *Selby*, 3 Scott, N. R. 409, 417; Arg. 1 M. & S. 333. See *Sanderson* v. *Dobson*, cited *ante*, p. ; and *per* Byles, J., *Jegon* v. *Vivian*, L. R. 1 C. P. 24; S. C., 2 *Id.*, 422, L. R. 3 H. L. 289; *Doe* d. *Haw* v. *Earles*, 15 M. & W. 450. See, also, *Vandeleur* v. *Vandeleur*, 3 Cl. & Fin. 98, where the maxim is differently applied.

(*h*) Co. Litt. 225. a.; 10 Rep. 58; Wing. Max., p. 13; D. 50. 17. 110. § 3.

(*i*) *Doe* d. *Everett* v. *Cooke*, 7 East, 272; *Johnson* v. *Simcock*, 7 H. & N.

According to the same rule of grammar, also, where a condition inserted in a deed consists of two parts in the conjunctive, both must be performed, but otherwise where the condition is in the disjunctive; and where a condition or limitation is both in the conjunctive and disjunctive, the latter shall be taken to refer to the whole; as, if a lease be made to husband and wife for the term of twenty-one years, "if the husband *and* wife, *or* any child between them shall so long live," and the wife dies without issue, the lease shall, nevertheless, continue during the life of the husband, because the above condition shall be construed throughout in the disjunctive (*k*).

The disjunctive is also read as conjunctive, except in devises which create an estate tail, where an estate is limited to A. and his heirs, but if A. should die under the age of twenty-one or without issue then over. The principle is stated to be that where the dying under twenty-one is associated with the event of the devisee leaving an object who would take an interest derivatively through him, the copulative (or conjunctive) construction is to prevail (*l*). Therefore if A. dies under twenty-one leaving issue the gift over fails; and also if A. attains the age of twenty-one, but dies without issue, the gift over fails since both events must happen, *i.e.*, A. dying under twenty-one *and* leaving no issue, before the gift over can take effect.

Statutes. In the construction of statutes, likewise, the rule

344; S. C., 6 *Id.* 6. As to changing the copulative into the disjunctive, see 1 Jarman on Wills, 4th ed., 505, *et seq.*; *Mortimer* v. *Hartley*, 6 Exch. 47; S. C., 6 C. B. 819; 3 De G. & S. 316.

(*k*) Co. Litt. 225. a.; Shep. Touch. 138, 139. See, also, *Burgess* v. *Bracher*, 2 Lord. Raym. 1366.

(*l*) Jarman on Wills, 4th ed., vol. 1, 508.

Noscitur à sociis is very frequently applied, the meaning of a word, and, consequently, the intention of the legislature, being ascertained by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis*, and referable to the same subject-matter (*m*). Especially must it be remembered that "the sages of the law have been used to collect the sense and meaning of the law by comparing one part with another and by viewing all the parts together as one whole, and not of one part only by itself—*nemo enim aliquam partem rectè intelligere possit antequam totum iterum atque iterum perlegerit*" (*n*).

General words in a statute, how controlled.

The following illustrations will show how general words in a statute are more or less limited by the particular words which precede them. By the statute 7 & 8 Geo. IV., c. 75, s. 37, a penalty is imposed upon any person not being a freeman of the Watermen's Company, who shall navigate any wherry, lighter, or other craft upon the Thames within certain limits. It was held upon the principle of the maxim *Noscitur à sociis*, that a steam tug of eighty-seven tons burden engaged in moving another vessel was not a craft within the meaning of the statute (*o*).

Again, by 5 Geo. IV., c. 83, s. 4, it is an offence to use any subtle craft, means, or device by palmistry, or otherwise, to deceive and impose on any of His Majesty's

(*m*) *Per* Coleridge, J., *Cooper* v. *Harding*, 7 Q. B. 941; Judgm., *Stephens* v. *Taprell*, 2 Curt. 465; *per* Channell, B., *Pearson* v. *Hull Local Board of Health*, 3 H. & C. 944.

The maxim *supra* was applied to construe a statute in *Hardy* v. *Tingey*, 5 Exch. 294, 298—to ascertain the meaning of libellous words in *Wakley* v. *Cooke*, 4 Exch. 511, 519.

(*n*) Arg., 7 Howard (U.S.), R. 637, citing *Lincoln College case*, 3 Rep. 596.

(*o*) *Reed* v. *Ingham*, 3 Ell. & Bl. 889.

subjects. The defendant having attempted to deceive and impose upon certain persons by falsely pretending to have the supernatural faculty of obtaining from the spirits of the dead answers and raps, was held properly convicted of the offence specified in the statute, the words "or otherwise" not being limited to any precise class or genus of deception, but simply limited to such deceptions as were similar in character to palmistry (*p*). Here the general words were not limited to things *ejusdem generis* as the specified offence, but to things like in their nature to that offence.

We shall conclude these remarks with observing, that the three rules or canons of construction with which we have commenced this chapter are intimately connected together,—that they must always be kept in view collectively when the practitioner applies himself to the interpretation of a doubtful instrument.

VERBA CHARTARUM FORTIUS ACCIPIUNTUR CONTRA PROFERENTEM. (*Co. Litt.* 36. *a.*)—*The words of an instrument shall be taken most strongly against the party employing them.*

This maxim ought to be applied only where other rules of construction fail (*q*), and, indeed, it is doubtful whether it is to be regarded as a sound canon of construction since the case of *Taylor* v. *The Corporation of St. Helen's* (*r*), in which the late Master of the Rolls, *Jessel*, M. R., is reported to have said: "I do not see how, according to

(*p*) *Monck* v. *Hilton*, 2 Ex. Div. 268; 46 L. J. M. C. 163.

(*q*) Judgment, *Lindus* v. *Melrose*, 3 H. & N. 182.

(*r*) 6 Ch. Div. 264, 280; 46 L. J. Ch. 857.

the now established rules of construction as settled by the House of Lords in the well-known case of *Grey* v. *Pearson* (*s*), followed by *Roddy* v. *Fitzgerald* (*t*) and *Abbott* v. *Middleton* (*u*), the maxim can be considered as having any force at the present day. The rule is to find out the meaning of the instrument according to the ordinary and proper rules of construction. If we can thus find out its meaning, we do not want the maxim. If, on the other hand, we cannot find out its meaning, then the instrument is void for uncertainty, and in that case it may be said that the instrument is construed in favour of the grantor, for the grant is annulled." Perhaps the maxim may be paraphrased thus,—that, as between the grantor and grantee, or between the maker of an instrument and the holder, if the words of the grant or instrument are of doubtful import, that construction shall be placed upon them which is most favourable to the grantee or holder.

The rule has been held to apply more strongly to a deed-poll (*x*) than to an indenture, because in the former case the words are those of the grantor only (*y*). But though a deed-poll is to be construed against the grantor, the Court will not add words to it, nor give it a meaning contradictory to its language (*z*). Deed-poll.

If, then, a tenant in fee simple grants to any one an estate for life generally, this shall be construed to mean an estate for the life of the grantee, because an estate for a man's whole life is higher than for the life of another (*a*). Grant, &c.

(*s*) 6 H. L. Cas. 61.
(*t*) 6 H. L. Cas. 823.
(*u*) 7 H. L. Cas. 68.
(*x*) See stats. 8 & 9 Vict. c. 106, s. 5; 7 & 8 Vict. c. 76, s. 11.
(*y*) Plowd. 134; Shep. Touch., by Preston, 88, n. (81).
(*z*) *Per* Williams, J., *Doe* d. *Myatt* v. *St. Helens, R. C.*, 2 Q. B. 373.
(*a*) Co. Litt. 42. a.; Plowd. 156; Finch. Law, 63; Shep. Touch. 88.

But if tenant for life leases to another for life, without specifying for whose life, this shall be taken to be a lease for the lessor's own life; for this is the greatest estate which it is in his power to grant (*b*). And, as a general rule, it appears clear, that, if a doubt arise as to the construction of a lease between the lessor and lessee, the lease must be construed most beneficially for the latter (*c*).

In like manner, if two tenants in common grant a rent of 10*s*. this is several, and the grantee shall have 10*s*. from each; but if they make a lease, and reserve 10*s*. they shall have only 10*s*. between them (*d*). So it is a true canon of construction, that where there is any reasonable degree of doubt as to the meaning of an exception in a lease, the words of the exception, being the words of the lessor, are to be taken most favourably for the lessee, and against the lessor (*e*); and where a deed may enure to divers purposes, he to whom the deed is made shall have election which way to take it, and he shall take it in that way which shall be most to his advantage (*f*). But it seems that the instrument should, in such a case, if pleaded, be stated according to its legal effect, in that way in which it is intended to have it operate (*g*).

According to the principle above laid down, it was held that leasehold lands passed by the conveyance of the freehold, "and all lands or meadows to the said messuage

(*b*) Finch, Law, 55, 56. See also, *Id.* 60.

(*c*) *Dunn* v. *Spurrier*, 3 B. & P. 399, 403, where various authorities are cited. See also Judgm., 1 Cr. & M. 657.

(*d*) 5 Rep. 7; Plowd. 140; Co. Litt. 197. a., 267. b.

(*e*) *Per* Bayley, J., *Bullen* v. *Denning*, 5 B. & C. 847.

(*f*) Shep. Touch. 83; cited 8 Bing. 106.

(*g*) 2 Smith, L. C., 8th ed., 545, and cases there cited.

or mill belonging, or used, occupied, and enjoyed, or deemed, taken, or accepted as part thereof." This, said Lord *Loughborough*, C.J., being a case arising on a deed, is to be distinguished from cases of a like nature which have arisen on wills. In general, where there is a question on the construction of a will, neither party has done anything to preclude himself from the favour of the Court. But, in the present instance, the legal maxim applies, that *a deed shall be construed most strongly against the grantor* (*h*).

The rule of law, moreover, that a man's own acts shall be taken most strongly against himself, not only obtains in grants, but extends, in principle, to other engagements and undertakings (*i*).

Thus, the return to a writ of *fi. fa.* shall, if the meaning be doubtful, be construed against the sheriff; nor, if sued for a false return, shall he be allowed to defend himself by putting a construction on his own return which would make it bad in law, when it admits of another construction which will make it good (*k*).

Simple contracts.

In like manner, with respect to contracts not under seal, the generally received doctrine of law undoubtedly is, that the party who makes any instrument should take care so to express the amount of his own liability, as that he may not be bound further than it was his intention

(*h*) *Doe* d. *Davies* v. *Williams*, 1 H. Bla. 25, 27.

(*i*) 1 H. Bla. 586.

A release in deed, being the act of the party, shall be taken most strongly against himself; Co. Litt. 264. b.; cited Judgm., *Ford* v. *Beech*, 11 Q. B. 869.

"Although the words of a covenant are to be construed according to the intent of the parties, yet they are to be taken most strongly against the party who stipulates:" *per* Holroyd, J., *Webb* v. *Plummer*, 2 B. & Ald. 752. See *West London R. C.* v. *London and North Western R. C.*, 11 C. B. 254, 309, 339.

(*k*) See *Reynolds* v. *Barford*, 7 M. & Gr. 449, 456.

that he should be bound; and, on the other hand, that the party who receives the instrument, and parts with his goods on the faith of it, should rather have a construction put upon it in his favour, because the words of the instrument are not his, but those of the other party (*l*). This principle applies to a condition in a policy of insurance which "being the language of the company must, if there be any ambiguity in it, be taken most strongly against them" (*m*).

A remarkable illustration of the maxim is to be found in a case arising out of the failure of the Glasgow Bank. By the Articles of that Bank any person who became the holder of a share became subject to all the liabilities of an original partner. Certain shares in the Bank were transferred into the names of four persons who were entered in the stock ledger as 'trustees.' The bank suspended payment with large liabilities, and the trustees were placed on the first part of the list of contributories as liable to calls in their own right. On a petition to rectify the list it was decided that they were personally liable to the creditors of the Bank as partners, the House of Lords being of opinion that the expression, as trustees, was ambiguous and must be construed *fortius contra proferentes*, so as to carry out the main object of the contract (*n*).

(*l*) *Per* Alderson, B., *Mayer* v. *Isaac*, 6 M. & W. 612; commenting on the observations of Bayley, B., in *Nicholson* v. *Paget*, 1 Cr. & M. 48. See *Alder* v. *Boyle*, 4 C. B. 635.

(*m*) *Per* Cockburn, C.J., *Notman* v. *Anchor Ass. Co.*, 4 C. B. N. S. 481; *Fitton* v. *Accidental Death Insur. Co.*, 17 C. B. N. S. 134, 135; *Fowkes* v. *Manchester and London Life Ass. Co.*, 32 L. J. Q. B. 153, 157, 159; 3 B. & S. 917; *per* Lord St. Leonards, *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484; *per* Blackburn, J., *Braunstein* v. *Accidental Death Insur. Co.*, 1 B. & S. 799.

(*n*) *Muir* v. *City of Glasgow Bank*, 4 App. Cas. 337; 40 L. J. 339.

If the party giving a guarantee leaves anything ambiguous in his expressions, it has been said that such ambiguity must be taken most strongly against himself (*o*); though it would rather seem that the document in question is to be construed according to the intention of the parties to it as expressed by the language which they have employed, understood fairly in the sense in which it is used, the intention being, if needful, ascertained by looking to the relative position of the parties at the time when the instrument was written (*p*).

If a carrier give two different notices, limiting his responsibility in case of loss, he will be bound by that which is least beneficial to himself (*q*). In like manner, where a party made a contract of sale as agent for A., and, on the face of such agreement, stated, that he made the purchase, paid the deposit, and agreed to comply with the conditions of sale, for A., and in the mere character of agent, it was held, that this act of the contracting party must be taken *fortissimè contra proferentem;* and that he could not, therefore, sue as principal on the agreement, without notice to the defendant before action brought, that he was the party really interested (*r*). So, if an instrument be couched in terms so ambiguous as to make it doubtful whether it be a bill of exchange or promissory note, the holder may, as against the party who made the instrument, treat it as either (*s*). If documents are drawn and

(*o*) *Hargreave* v. *Smee*, 6 Bing. 244, 248; *Stephens* v. *Pell*, 2 Cr. & M. 710. See *Cumpston* v. *Haigh*, 2 Bing. N. C. 449, 454.

(*p*) *Per* Bovill, C.J., *Coles* v. *Pack*, L. R. 5 C. P. 70; *Wood* v. *Priestner*, L. R. 2 Ex. 66, 282.

(*q*) *Munn* v. *Baker*, 2 Stark., N. P. C. 255. See *Phillips* v. *Edwards*, 3 H. & N. 813, 820.

(*r*) *Bickerton* v. *Burrell*, 5 M. & S. 383, 336, as to which case, see *Rayner* v. *Grote*, 15 M. & W. 359. See also, *Boulton* v. *Jones*, 2 H. & N. 564, and cases there cited; *Carr* v. *Jackson*, 7 Exch. 382.

(*s*) *Edis* v. *Bury*, 6 B. & C. 433; *Block* v. *Bell*, 1 M. & Rob. 149;

accepted by the same parties (which in strictness would make them promissory notes and not bills of exchange), yet if the intention to give and receive such documents as bills of exchange be clear both the parties to the documents and the holders may treat them as such (*t*).

In the Roman law, the rule under consideration for the construction of contracts may be said, in substance, to have existed, although its meaning differed considerably from that which attaches to it in our own: the rule there was, *Fere secundum promissorem interpretamur* (*u*), where *promissor*, in fact, signified the person who contracted the obligation (*x*), that is, who replied to the *stipulatio* proposed by the other contracting party. In case of doubt, then, the clause in the contract thus offered and accepted, was interpreted against the *stipulator*, and in favour of the *promissor*; *in stipulationibus cùm quæritur quid actum sit verba contra stipulatorem interpretanda sunt* (*y*); and the reason given for this mode of construction is, *quia stipulatori liberum fuit verba late concipere* (*z*): the person stipulating should take care fully to express that which he proposes shall be done for his own benefit. But, as remarked by Mr. Chancellor *Kent*, the true principle appears to be "to give the contract the sense in which the person making the promise believed the other party to have accepted it, if he in fact did so understand and accept it" (*a*);

Lloyd v. *Oliver*, 18 Q. B. 471; *Forbes* v. *Marshall*, 11 Exch. 166. In *M'Call* v. *Taylor*, 19 C. B. N. S. 301, the instrument in question was held to be neither a bill of exchange nor a promissory note.

(*t*) *Willans* v. *Ayres*, 3 App. Cas. 133; 47 L. J., P. C. 1.

(*u*) D. 45. 1. 99. pr.

(*x*) Brisson. *ad verb.* "*Promissor*," "*Stipulatio*;" 1 Pothier, by Evans, 58.

(*y*) D. 45. 1. 38, § 18.

(*z*) D. 45. 1. 99. pr.; D. 2. 14. 39.

(*a*) 2 Kent, Com., 12th ed., vol. 2,

though this remark must necessarily be understood as applicable only where an ambiguity exists after applying those various and stringent rules of interpretation by which the meaning of a passage must, in very many cases, be determined. When dealing with a *mercantile* instrument, moreover, "the Courts are not restrained to such nicety of construction as is the case with regard to conveyances, pleadings, and the like," and in reference to a charter-party, it has been observed (*b*), that "generally speaking where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff and the least burthensome to the defendant." Further, in reference to the same instrument, it has been remarked that the merchant "is in most cases the party best acquainted with the trade for which the ship is taken up, and with the difficulties which may impede the performance by him of his contract; words, therefore, in a charter-party relaxing in his favour a clause by which an allowance to him of time for a specified object is in the interest of the ship precisely limited, must be read as inserted on his requirement, and construed at the least with this degree of strictness against him that they shall not have put upon them an addition to their obvious meaning;" though where that meaning is ambiguous it must be gathered from the surrounding circumstances to which the charter-party was intended to apply (*c*)

When the general rule

It must further be observed, that the general rule in

557 : 20 Day (U.S.), R. 281 ; Paley Moral Phil., 4th ed., 125, 127 ; 1 Duer, Insur. 159, 160.

(*b*) *Per* Maule, J., *Cockburn* v. *Alexander*, 6 C. B. 814, and in *Gether* v. *Capper*, 15 C. B. 707 ; S. C., 18 *Id.* 866.

(*c*) Judgm., *Hudson* v. *Ede*, L. R. 2 Q. B. 578.

should be applied.

question, being one of some strictness and rigour, is the last to be resorted to, and is never to be relied upon but when all other rules of exposition fail (*d*). In some cases, indeed, it is possible that any construction which the Court may adopt will be contrary to the real meaning of the parties; and, if parties make use of such uncertain terms in their contracts, the safest way is to go by the grammatical construction, and if the sense of the words be *in equilibrio*, then the strict rule of law must be applied (*e*).

Exception to rule — When it would work a wrong to a third person.

Moreover, the principle under consideration does not seem to hold when a harsh construction would work a wrong to a third person, it being a maxim that *Constructio legis non facit injuriam* (*f*). Therefore if tenant in tail make a lease for life generally, this shall be taken to mean a lease for the life of the lessor (*g*), for this stands well with the law; and not for the life of the lessee, which it is beyond the power of a tenant in tail to grant (*h*).

Wills and statutes.

Acts of Parliament are not, in general, within the reason of the rule under consideration, because they are not the words of *parties*, but of the legislature; neither does this rule apply to wills (*i*). Where, however, an

Public companies.

Act of Parliament is passed for the benefit of a canal, railway, or other company, it has been observed, that this, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are

(*d*) Bac. Max., reg. 3; 1 Duer. Insur. 210.

(*e*) *Per* Bayley, J., *Love* v. *Pares*, 13 East, 86.

(*f*) Co. Litt. 183, a; Shepp. Touch. 88; Judgm., *Rodger* v. *The Comptoir d'Escompte de Paris*, L. R. 2 P. C. 406.

(*g*) *Per* Bayley, J., *Smith* v. *Doe* d. *Earl of Jersey*, 2 B. & B. 551; Finch, Law, 60.

(*h*) 2 Com. by Broom & Hadley, 507.

(*i*) 2 Dwarr. Stats. 688; Bac. Max., reg. 3.

expressed and set forth in the Act, and the rule of construction (*j*) in all such cases is now fully established to be, that any ambiguity in the terms of the contract must operate against the adventurers, and in favour of the public, the former being entitled to claim nothing which is not *clearly* given to them by the Act (*k*). Where, therefore, by such an Act of Parliament, rates are imposed upon the public and for the benefit of the company, such rates must be considered as a tax upon the subject; and it is a sound general rule, that a tax shall not be considered to be imposed (or at least not for the benefit of a subject) without a plain declaration of the intent of the legislature to impose it (*l*).

In a well-known case, which is usually cited as an authority with reference to the construction of Acts for the formation of companies with a view to carrying works of a public nature into execution, the law was thus laid

(*j*) The rule that a private Act of Parliament "is to be construed as a contract or a conveyance, is a mere rule of construction;" *per* Byles, J., 6 C. B. N. S. 218–9. As to the recitals in a Private Act, see *The Shrewsbury Peerage*, 7 H. L. Cas. 1.

(*k*) *Per* Lord Tenterden, C.J., *Stourbridge Canal Co.* v. *Wheeley*, 2 B. & Ad. 793; recognized *Priestley* v. *Foulds*, 2 Scott, N. R. 228; *per* Coltman, J., *Id.* 226; cited Arg. *Id.* 738; Judgm., *Gildart* v. *Gladstone*, 11 East, 685; recognized *Barrett* v. *Stockton and Darlington R. C.*, 2 Scott, N. R. 370; S. C., affirmed in error, 3 Scott, N. R. 803; and in the House of Lords, 8 Scott, N. R. 641; cited *Ribble Navigation Co.* v. *Hargreaves*, 17 C. B. 385, 402; *per* Maule, J., *Portsmouth Floating Bridge Co.* v. *Nance*, 6 Scott, N. R. 831; *Blakemore* v. *Glamorganshire Canal Nav.*, 1 My. & K. 165 (as to the remarks of Lord Eldon in which case, see *per* Alderson, B., *Lee* v. *Milner*, 2 Yo. & C. 618; *per* Lord Chelmsford, C., *Ware* v. *Regent's Canal Co.*, 28 L. J. Chanc. 157; *per* Erle, C.J., *Baxendale* v. *Great Western R. C.*, 16 C. B. N. S. 137); Arg., *Thicknesse* v. *Lancaster Canal Co.*, 4 M. & W. 482.

(*l*) Judgm., *Kingston-upon-Hull Dock Co.* v. *Browne*, 2 B. & Ad. 58, 59; *Grantham Canal Nav. Co.* v. *Hall* (in error), 14 M. & W. 880.

Remarks of Lord Eldon, C.

down by Lord *Eldon*:—"When I look upon these Acts of Parliament, I regard them all in the light of contracts made by the legislature on behalf of every person interested in anything to be done under them; and I have no hesitation in asserting, that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than anything in the whole system of administration under our constitution. Such Acts of Parliament have now become extremely numerous, and from their number and operation, they so much affect individuals, that I apprehend those who come for them to Parliament do in effect undertake that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else; that they shall do and shall forbear all that they are thereby required to do and to forbear as well with reference to the interests of the public as with reference to the interests of individuals" (*m*). Acts of Parliament, such as here referred to (*n*), have been called Parliamentary bargains made with each of the landowners. Perhaps more correctly they ought to be treated as conditional powers given by Parliament to take the land of the different proprietors, through whose estates the works are to proceed. Each landowner, therefore, has a right to have the powers strictly and literally carried into effect as regards his own land, and has a right also to require that no variation shall be made to his prejudice in the carrying into effect the bargain between the undertakers and any one else (*o*).

(*m*) *Blakemore* v. *Glamorganshire Canal Nav.*, 1 My. & K. 162; cited Judgm., 1 R. & B. 868, 869.

(*n*) See also *supra* (*j*) and (*l*).

(*o*) *Per* Alderson, B., *Lee* v. *Milner*, 2 Yo. & C. 611, 618;

Railway Acts.

So, with respect to Railway Acts, it has been repeatedly laid down, that the language of these Acts of Parliament is to be treated as the language of the promoters of them; they ask the legislature to confer great privileges upon them, and profess to give the public certain advantages in return. Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favour of the public (*p*). "The statute," says *Alderson*, B. (*q*), speaking of a railway company's Act, "gives this company power to take a man's land without any conveyance at all; for if they cannot find out who can make a conveyance to them, or if he refuse to convey, or if he fail to make out a title, they may pay their money into Chancery, and the land is at once vested in them by a parliamentary title. But in order to enable them to exercise this power, they must *follow the words of the Act strictly.*" And it is clear that the words of a statute will not be strained beyond their reasonable import to impose a burthen upon, or to restrict the operation of, a public company (*r*). It will, of course, be borne in mind that the general principle of construing an Act of Parliament of the kind above alluded to *contra proferentem*, can only be applied where a doubt presents itself as to the meaning of the legislature; for such an Act, and every part of it, must be read according to the ordinary

adopted Judgm., *York and North Midland R. C.* v. *Reg.*, 1 E. & B. 869.

(*p*) Judgm., *Parker* v. *Great Western R. C.*, 7 Scott, N. R. 870.

(*q*) *Doe* d. *Hutchinson* v. *Manchester, Bury, and Rossendale R. C.*, 14 M. & W. 694; *Webb* v. *Manchester and Leeds R. C.*, 1 Railw. Cas. 576, 599; *per* Lord Langdale, M. R., *Gray* v. *Liverpool and Bury R. C.*, 4 *Id.* 240.

(*r*) *Smith* v. *Bell*, 2 Railw. Cas. 877; *Parrett Nav. Co.* v. *Robins*, 3 *Id.* 383; with which *acc. Cracknell* v. *Mayor, &c., of Thetford*, L. R. 4 C. P. 634, 637.

and grammatical sense of the words used, and with reference to those established rules of construction which we have already stated.

Grant from the Crown.

Lastly, with reference to the maxim *fortius contra proferentem*,—where a question arises on the construction of a grant from the Crown, the rule under consideration is reversed; for such grant is construed most strictly against the grantee, and most beneficially for the Crown, so that nothing will pass to the grantee but by clear and express words (*s*); the method of construction just stated seeming, as judicially remarked (*t*), "to exclude the application of either of these two phrases (*u*), *expressum facit cessare tacitum*, or *expressio unius est exclusio alterius*. That which the Crown has not granted by express, clear and unambiguous terms, the subject has no right to claim under a grant or charter" (*x*).

(*s*) Arg., *R.* v. *Mayor, &c., of London*, 1 Cr. M. & R., 12, 15, and cases there cited; Chit. Pre. of the Crown, 391; Finch, Law, 101.

(*t*) *Per* Pollock, C.B., *Eastern Archipelago Co.* v. *Reg.*, 2 E. & B. 906, 907; S. C., *Id.* 310.

(*u*) *Post*, p. 606.

(*x*) It is established on the best authority, that in construing grants from the Crown, a different rule of construction prevails from that by which grants from one subject to another are to be construed. In a grant from one subject to another, every intendment is to be made against the grantor, and in favour of the grantee, in order to give full effect to the grant; but in grants from the Crown an opposite rule of construction prevails. Nothing passes except that which is expressed, or which is matter of necessary and unavoidable intendment, in order to give effect to the plain and undoubted intention of the grant. And in no species of grant does this rule of construction more especially obtain than in grants which emanate from, and operate in derogation of, the prerogative of the Crown: *ex. gr.* where a monopoly is granted, Judgm., *Feather* v. *Reg.*, 5 B. & S. 283–4; citing, *per* Lord Stowell, *The Rebeckah*, 1 Rob. 227, 230.

AMBIGUITAS VERBORUM LATENS VERIFICATIONE SUPPLETUR; NAM QUOD EX FACTO ORITUR AMBIGUUM VERIFICATIONE FACTI TOLLITUR. (*Bac. Max., reg.* 23.)—*Latent ambiguity may be supplied by evidence; for an ambiguity which arises by proof of an extrinsic fact may, in the same manner, be removed.*

Definition of latent and patent ambiguity.

Two kinds of ambiguity occur in written instruments: the one is called *ambiguitas latens* (*y*), *i.e.*, where the writing appears on the face of it certain and free from ambiguity; but the ambiguity is introduced by evidence of something extrinsic, or by some collateral matter out of the instrument: the other species is called *ambiguitas patens*, *i.e.*, an ambiguity apparent on the face of the instrument itself (*z*).

Rule as to patent ambiguity.

Ambiguitas patens, says Lord *Bacon*, cannot be holpen by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of the lower account in law, for that were to make all deeds hollow, and subject to averment; and so, in effect, to make that pass without deed which the law appoints shall not pass but by deed (*a*); and this rule, as above

(*y*) Of which see an example, *Raffles* v. *Wichelhaus*, 2 H. & C. 906.

(*z*) Bac. Max., reg. 23. The remarks respecting ambiguity here offered, should be taken in connection with those appended to the five maxims which successively follow. The subject of latent and patent ambiguities, and likewise of misdescription, has been very briefly treated in the text, since ample information thereupon may be obtained by reference to the masterly treatise of Sir James Wigram, upon the "Admission of Extrinsic Evidence in Aid of the Interpretation of Wills."

(*a*) Bac. Max., reg. 23; *Doe* d. *Tyrrell* v. *Lyfford*, 4 M. & S. 550; *Lord Cholmondeley* v. *Lord Clinton*,

stated and explained, applies not only to deeds, but to written contracts in general (*b*); and especially, as will be seen by the examples immediately following, to wills.

On this principle, a devise to "one of the sons of J. S." (who has several sons), cannot be explained by parol proof (*c*); and if there be a blank in the will for the devisee's name, parol evidence cannot be admitted to show what person's name the testator intended to insert (*d*); it being an important rule, that, in expounding a will, the Court is to ascertain, not what the testator actually intended as contradistinguished from what his words express, but what is the meaning of the words he has used (*e*).

If, as observed by Sir James *Wigram*, the Statute of Frauds merely had required that a nuncupative will should not be set up in opposition to a written will, parol evidence might, in many cases, be admissible to explain the intention of the testator, where the person or thing intended by him is not adequately described in the will;

2 Mer. 343; Judgm., *Doe* d. *Gord* v. *Needs*, 2 M. & W. 139; S. P., *Stead* v. *Berrier*, Sir T. Raym. 411.

(*b*) See *Hollier* v. *Eyre*, 9 Cl. & Fin. 1.

A contract, observes Pollock, C.B., in *Nichol* v. *Godts*, 10 Exch. 194, "must be read according to what is written by the parties, for it is a well-known principle of law, that a written contract cannot be altered by parol. If A. and B. make a contract in writing, evidence is not admissible to show that A. meant something different from what is stated in the contract itself, and that B. at the time assented to it. If that sort of evidence were admitted, every written document would be at the mercy of witnesses who might be called to swear anything." See *Besant* v. *Cross*, 10 C. B. 895; *Martin* v. *Pycroft*, 2 De G. M. & G. 785; *post*, Chap. X.

(*c*) *Strode* v. *Russel*, 2 Vern. 624; *Cheyney's case*, 5 Rep. 68. See *Castledon* v. *Turner*, 3 Atk. 257; *Harris* v. *Bishop of Lincoln*, 2 P. Wms. 136, 137; *per* Tindal, C.J., *Doe* d. *Winter* v. *Perratt*, 7 Scott, N. R. 36. See, also, *per* Littledale, J., and Parke, J., in *Shortrede* v. *Cheek*, 1 A. & E. 57.

(*d*) *Baylis* v. *A.-G.*, 2 Atk. 239; *Hunt* v. *Hort*, 3 Bro. C. C. 311; cited 8 Bing. 254.

(*e*) *Per* Parke, J., *Doe* d. *Gwillim* v. *Gwillim*, 5 B. & Ad. 129.

but if the true meaning of that statute be, that the writing which it requires shall itself express the intention of the testator, it is difficult to understand how the statute can be satisfied by a writing merely, if the description it contains have nothing *in common with* that of the person intended to take under it, or not enough to determine his identity. To define that which is indefinite is to make a material addition to the will (*f*). In accordance with these observations, where a testator devised his real estates "first to K., then to ——, then to L., then to M., &c.," and the will referred to a card as showing the parties designated by the letters in the will, which card, however, was not shown to have been in existence at the time of the execution of the will, it was held clearly inadmissible in evidence; the Court observing, that this was a case of a patent ambiguity; and that according to all the authorities on the subject, parol evidence to explain the meaning of the will could not legally be admitted (*g*).

If, then, as further observed in the treatise already cited, a testator's words, aided by the light derived from the circumstances with reference to which they were used, do not express the intention ascribed to him, evidence to prove the sense in which he intended to use them is as a general proposition, inadmissible; in other words, the judgment of a Court in expounding a will must be simply declaratory of what is in the will (*h*); and to make a construction of a will where the intent of the testator

(*f*) See Wigram, Extrin. Evid., 3rd ed. 120, 121.

(*g*) *Clayton* v. *Lord Nugent*, 13 M. & W. 200.

(*h*) Wigram, Extrin. Evid., 3rd ed., 87th and following pages, in which many instances of the application of this rule are given. And refer to *Goblet* v. *Beechey*, *Id.* p. 185; S. C., 3 Sim. 24.

cannot be known, has been designated as *intentio cæca et sicca* (*i*).

The devise, therefore, in cases falling within the scope of the above observation, will, since the will is *insensible*, and not really *expressive of any intention*, be void for uncertainty (*k*).

Evidence is admissible to show which of two or more persons the testator refers to when the description in the will applies with legal certainty to them all. Thus where a testator devised certain property to his nephew Joseph Grant, evidence was admitted to show that the testator had two nephews of that name, one his brother's child, and the other the son of his wife's brother, and a latent ambiguity being thus shown by extrinsic evidence, further evidence was admitted to show which of the two persons was the object of the testator's bounty, and the Court decided in favour of the son of the wife's brother (*l*)

The rule as to patent ambiguities which we have just been considering is by no means confined in its operation to the interpretation of wills; for instance, where a bill of exchange was expressed in figures to be drawn for 245*l*., and in words for two hundred pounds, value received, with a stamp applicable to the higher amount, evidence to show that the words "and forty-five" had been omitted by mistake, was held inadmissible (*m*); for, the doubt being on the face of the instrument, extrinsic evidence could not be received to explain it. The instru-

(*i*) *Per* Rolle, C.J., *Taylor* v. *Web*, Styles, 319.

(*k*) In *The Mayor, &c., of Gloucester* v. *Osborn*, 1 H. L. Cas. 272, legacies were held to have failed for uncertainty of purpose.

(*l*) *Grant* v. *Grant*, L. R. 2 P. & D. 2.

(*m*) *Saunderson* v. *Piper*, 5 Bing. N. C. 425.

ment, however, was held to be a good bill for the smaller amount, it being a rule laid down by commercial writers, that, where a difference appears between the figures and the words of a bill, it is safer to attend to the words (*n*). But, although a patent ambiguity cannot be explained by extrinsic evidence, it may, in some cases, be helped by construction, or a careful comparison of other portions of the instrument with that particular part in which the ambiguity arises; and in others, it may be helped by a right of election vested in the grantee or devisee (*o*), the power being given to him of rendering certain that which was before altogether uncertain and undetermined. For instance, where a general grant is made of ten acres of ground adjoining or surrounding a particular house, part of a larger quantity of ground, the choice of such ten acres is in the grantee, and a devise to the like effect is to be considered as a grant (*p*); and if I grant ten acres of wood where I have one hundred, the grantee may elect which ten he will take; for, in such a case, the law presumes the grantor to have been indifferent on the subject (*q*). So, if a testator leaves a number of articles of the same kind to a legatee, and dies possessed of a greater number, the legatee and not the executor has the right of selection (*r*).

On the whole, then, we may observe, in the language of Lord *Bacon*, that all ambiguity of words within the deed, and not out of the deed, may be helped by construction,

(*n*) *Id.* 431, 434.

(*o*) See *Duckmanton* v. *Duckmanton*, 5 H. & N. 219.

(*p*) *Hobson* v. *Blackburn*, 1 My. & K. 571, 575.

(*q*) Bac. Max., reg. 23. See, also *per* Cur., in *Richardson* v. *Watson*, 4 B. & Ad. 787; Vin. Abr. "*Grants*," (H. 5).

(*r*) *Jacques* v. *Chambers*, 2 Colly. 435.

or, in some cases, by election, but never by averment, but rather shall make the deed void for uncertainty (*s*).

Rule, how qualified.

The general rule, however, as to patent ambiguity must be received with this qualification, viz., that extrinsic evidence is unquestionably admissible for the purpose of showing that the uncertainty which appears on the face of the instrument does not, in point of fact, exist; and that the intent of the party, though uncertainly and ambiguously expressed, may yet be ascertained, by proof of facts, to such a degree of certainty as to allow of the intent being carried into effect (*t*); in cases falling within the scope of this remark, the evidence is received, not for the purpose of proving the testator's intention, but of explaining the words which he has used. Suppose, for instance, a legacy, "to one of the children of A.," by her late husband B.; suppose, further, that A. had only one son by B., and that this fact was known to the testator; the necessary consequence, in such a case, of bringing the words of the will into contact with the circumstances to which they refer, must be to determine the identity of the person intended, it being the form of expression only, and not the intention, which is ambiguous; and evidence of facts requisite to reduce the testator's meaning to certainty would not, it should seem, in the instance above put, be excluded; though it would be quite another question if A. had more sons than one, or if her husband were living (*u*).

Latent ambiguity.

With respect to *ambiguitas latans*, the rule is, that, inasmuch as the ambiguity is raised by extrinsic evidence,

(*s*) Bac. Max., reg. 23; *per* Tindal, C.J., 7 Scott, N. R. 36; Wigram, Extrin. Evid., 3rd ed., 83, 101.

(*t*) 2 Phill. Evid., 10th ed., 339.

(*u*) Wigram, Ex. Evid., 3rd ed., 66.

so it may be removed in the same manner (*x*). Therefore, if a person grant his manor of S. to A. and his heirs, and the truth is, he hath the manors both of North S. and South S., this ambiguity shall be helped by averment as to the grantor's intention (*y*). So, if one devise to his son John, when he has two sons of that name (*z*), or to the eldest son of J. S., and two persons, as in the case of a second marriage, meet that designation (*a*), evidence is admissible to explain which of the two was intended. Wherever, in short, the words of the will in themselves are plain and unambiguous, but they become ambiguous by the circumstance that there are two persons, to each of whom the description applies, then parol evidence may be admitted to remove the ambiguity so created (*b*).

A like rule applies also where the subject-matter of a devise or bequest is called by divers names, "as if I give lands to Christchurch in Oxford, and the name of the corporation is *Ecclesia Christi in Universitate*, Oxford,

(*x*) 2 Phill. Evid., 10th ed., 392; Wigram Extrin. Evid., 3rd. ed., 101; *per* Williams, J., *Way* v. *Hearn*, 13 C. B. N. S. 305; Judgm., *Bradley* v. *Washington Steam Packet Co.*, 13 Peters (U.S.) R. 97. "A latent ambiguity is raised by evidence;" *per* Coleridge, J., *Simpson* v. *Margitson*, 11 Q. B. 25.

Where parol evidence has been improperly received to explain a supposed latent ambiguity, the Court *in banco* will decide upon the construction of the instrument without regard to the finding of the jury upon such evidence; *Bruff* v. *Conybeare*, 13 C. B. N. S. 263.

(*y*) Bac. Max., reg. 23; Plowd. 85. b.; *Miller* v. *Travers*, 8 Bing. 248.

(*z*) *Counden* v. *Clerke*, Hob. 32; *Fleming* v. *Fleming*, 1 H. & C. 242; *Jones* v. *Newman*, 1 W. Bla. 60; *Cheyney's case*, 5 Rep. 68; *per* Tindal, C.J., *Doe* d. *Winter* v. *Perratt*, 7 Scott, N. R. 36.

(*a*) *Per* Erskine, J., 5 Bing., N. C. 433; *Doe* d. *Gore* v. *Needs*, 2 M. & W. 129; *Richardson* v. *Watson*, 4 B. & Ad. 792. And see the cases on this subject, cited 2 Phill. Evid., 10th ed., 393, *et seq.*

(*b*) *Per* Alderson, B., 13 M. & W. 206, and in *Smith* v. *Jeffryes*, 15 M. & W. 561; *The Duke of Dorset* v. *Lord Hawarden*, 3 Curt. 80.

this shall be holpen by averment, because there appears no ambiguity in the words." (*c*).

In all cases, indeed, in which a difficulty arises in applying the words of a will to the thing which is the subject-matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted and removed by the production of further evidence upon the same subject, calculated to explain what was the estate or subject-matter really intended to be devised, or who was the person really intended to take under the will; and this appears to be the extent of the maxim as to *ambiguitas latens* (*d*). The characteristic of these cases is, that the words of the will *do* describe the object or subject intended, and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever; it only enables the Court to reject one of the subjects or objects to which the description in the will applies, and to determine which of the two the devisor understood to be signified by the description which he used in the will (*e*).

A devise was made of land to M. B., for life, remainder to "her three daughters, Mary, Elizabeth, and Ann," in fee, as tenants in common. At the date of the will, M. B. had two legitimate daughters, Mary and Ann, living, and one illegitimate, named Elizabeth. Extrinsic evidence was held admissible to rebut the claim of the last-mentioned, by showing that M. B. formerly had a legitimate daughter named Elizabeth, who died some years before

(*c*) Bac. Max., reg. 23.

(*d*) Judgm., *Miller* v. *Travers*, 8 Bing. 247, 248; *per* Abbott, C.J., *Doe* d. *Westlake* v. *Westlake*, 4 B. & Ald. 58; distinguished in *Fleming* v. *Fleming*, 1 H. & C. 242, 247.

(*e*) Judgm., *Doe* d. *Gord* v. *Needs*, 2 M. & W. 140; *Lord Walpole* v. *Earl of Cholmondeley*, 7 T. R. 138.

the date of the will, and that the testator did not know of her death, or of the birth of the illegitimate daughter (*f*).

"The rule as to the reception of parol evidence to explain a will," remarked Sir J. *Romilly*, M.R., in *Stringer* v. *Gardiner* (*g*), "is perfectly clear. In every case of ambiguity, whether latent or patent, parol evidence is admissible to show the state of the testator's family or property; but the cases in which parol evidence is admissible to show the person intended to be designated by the testator, are those cases of latent ambiguity, mentioned by Sir J. *Wigram*, where there are two or more persons who answer other descriptions in the will, each of whom standing alone, would be entitled to take."

It must not, however, be supposed that because no ambiguity arises on the face of the instrument, any doubt which is occasioned by the introduction of extrinsic evidence may be cleared up by having recourse to the declarations of the writer's intentions. This is not the law, and instances of strictly latent ambiguities might be given where evidence of declarations of intentions would be inadmissible. A will apparently plain and intelligible may when an inquiry is instituted respecting the persons or things to which it relates, turn out to be uncertain; that is, the persons or things may prove not to have been described with legal certainty. Suppose a bequest be made to the four children of A., and it appears that A. had six children, two by a first marriage, and the remainder by a second. Here, though evidence of the circumstances of the family and of the respective ages

(*f*) *Doe* d. *Thomas* v. *Benyon*, 12 A. & E. 431; *Doe* d. *Allen* v. *Allen*, *Id.* 451.

(*g*) 28 L. J., Chanc., 758.

of the children would no doubt be admissible with a view of identifying the particular legatees alluded to in the will, it seems that proof of the testator's declarations of intention could not be received (*h*).

Extrinsic evidence necessarily admissible for some purposes.

It is true, moreover, that parol evidence must be admissible to some extent to determine the application of *every* written instrument. It must, for instance, be received to show what it is that corresponds with the description (*i*); and the admissibility of such evidence for this purpose being conceded, it is only going one step further to give parol evidence, as in the above instances, of other extrinsic facts, which determine the application of the instrument to one subject, rather than to others, to which, on the face of it, it might appear equally applicable (*k*).

"Speaking philosophically," says *Rolfe*, B., "you must always look beyond the instrument itself to some extent, in order to ascertain who is meant; for instance, you must look to names and places" (*l*); and, "in every specific devise or bequest it is clearly competent and necessary to inquire as to the thing specifically devised or bequeathed" (*m*). Thus, "parol evidence is always necessary to show that the party sued is the person making the contract, and bound by it" (*n*). So, if the word Blackacre be used in a will, there must be evidence to show that the field in question is Blackacre (*o*).

(*h*) See *Doe* d. *Hiscocks* v. *Hiscocks*, 5 M. & W. 363.

(*i*) *Macdonald* v. *Longbottom*, 1 E. & B. 977.

(*k*) 2 Phill. Ev., 10th ed., 333.

(*l*) 13 M. & W. 207.

(*m*) *Per* Lord Cottenham, C., *Shuttleworth* v. *Greaves*, 4 My. & Cr. 38.

(*n*) Judgm., *Trueman* v. *Loder*, 11 A. & E. 594. See *Stebbing* v. *Spicer*, 8 C. B. 827.

(*o*) *Doe* d. *Preedy* v. *Holton*, 4 A. & E. 82; recognised, *Doe* d. *Norton* v. *Webster*, 12 A. & E. 450; cited, *per* Williams, J., *Doe* d. *Hem-*

Where there is a devise of an estate purchased of A., or of a farm in the occupation of B., it must be shown by extrinsic evidence, what estate it was that A. purchased, or what farm was in the occupation of B., before it can be known what is devised (*p*). So, whether parcel or not of the thing demised is always matter of evidence (*q*). In these and similar cases, the instrument appears on the face of it to be perfectly intelligible, and free from ambiguity, yet extrinsic evidence must, nevertheless, be received, for the purpose of showing what the instrument refers to (*r*).

The rule as to *ambiguitas latens*, above briefly stated, may likewise be applied to mercantile instruments, with a view to ascertain the *intention*, though not to vary the *contract* of the parties (*s*); and therefore where the plaintiffs, the patentees of a certain invention for the manufacture of rifles, had granted a licence to the defendants to use the patent, the latter covenanting to pay a certain royalty for every rifle manufactured "under the powers hereby granted," it being thought at that time (but erroneously) that all persons manufacturing for the government were entitled to the free use of a patent as the government itself, the Court admitted extrinsic

ming v. *Willetts*, 7 C. B. 715; *per* Bovill, C.J., *Horsey* v. *Graham*, L. R. 5 C. P. 14.

(*p*) *Per* Sir Wm. Grant, M.R., 1 Mer. 653.

(*q*) *Per* Buller, J., *Doe* d. *Freeland* v. *Burt*, 1 T. R. 701, 704; *Paddock* v. *Fradley*, 1 Cr. & J. 90; *Doe* d. *Beach* v. *Earl of Jersey*, 3 B. & C. 870; *Lyle* v. *Richards*, L. R. 1 H. L. 222.

(*r*) *Per* Patteson, J., and Coleridge, J., 4 A. & E. 81, 82. See *Doe* d. *Norton* v. *Webster*, 12 A. & E. 442. Evidence of coexisting circumstances admitted to explain the condition of a bond, *Montefiore* v. *Lloyd*, 15 C. B. N. S. 203. Evidence admitted to identify pauper with person described in indenture of apprenticeship, *Reg.* v. *Wooldale*, 6 Q. B. 549.

(*s*) *Smith* v. *Jeffryes*, 15 M. & W. 561.

evidence to show that the licence was not intended to apply to rifles manufactured by the defendants for the government on the ground that the words "under the powers hereby granted" contained a latent ambiguity, and might be explained by extraneous evidence (*t*). And although, generally speaking, the construction of a written contract is for the Court, when it is shown by extrinsic evidence that the terms of the contract are ambiguous, evidence is admissible to explain the ambiguity, and to show what the parties really meant. "Where there is an election between two meanings, it is, properly, a question for the jury" (*u*). And in a recent case (*x*), where the defendants under an agreement signed by them as three of the directors of a company had agreed to repay to the plaintiff 500*l.* advanced by him to the company, the learned judge, referring to the cases of *Macdonald* v. *Longbottom* (*y*), and *Acebol* v. *Levy* (*z*), admitted parol evidence to show that the defendants were liable as principals on the agreement, and ultimately gave judgment accordingly.

Where, as we shall hereafter see, a contract is entered into with reference to a known and recognized use of particular terms employed by the contracting parties, or with reference to a known and established usage, evidence may be given to show the meaning of those terms, or the nature of that usage, amongst persons conversant with the particular branch of commerce or business to which they

(*t*) *Roden* v. *London Small Arms Co.*, 46 L. J. Q. B. 213.

(*u*) *Per* Maule, J., *Smith* v. *Thompson*, 8 C. B. 59. As to ambiguous contracts, see, also, *Boden* v. *French*, 10 C. B. 886, 889.

(*x*) *McCollin* v. *Gilpin*, 6 Q. B. D. 516; 49 L. J. 558.

(*y*) 1 E. & B. 977; 28 L. J. Q. B. 293, affirmed in the Ex. Ch. 29 L. J. Q. B. 256.

(*z*) 10 Bing. 376.

relate. But cases of this latter class more properly fall within a branch of the law of evidence which we shall separately consider, viz., the applicability of usage and custom to the explanation of written instruments (*a*).

QUOTIES IN VERBIS NULLA EST AMBIGUITAS, IBI NULLA EXPOSITIO CONTRA VERBA FIENDA EST. (*Wing. Max. p.* 24.)—*In the absence of ambiguity, no exposition shall be made which is opposed to the express words of the instrument.*

Rule where there is not ambiguity.

It seems desirable, before proceeding with the consideration of some additional maxims relative to the subject of ambiguity in written instruments, to take this opportunity of observing that, according to the rule which stands at the head of these remarks, it is not allowable to interpret what has no need of interpretation, and that the law will not make an exposition against the express words and intent of the parties (*b*). Hence, if I grant to you that you and your heirs, or the heirs of your body, shall distrain for a rent of forty shillings within my manor of S., this, by construction of law, *ut res magis valeat*, shall amount to a grant of rent out of my manor of S., in fee-simple, or fee-tail; for the grant would be of little force or effect if the grantee had but a bare distress and no rent. But if a rent of forty shillings be granted out of the manor of D., with a right to distrain if

(*a*) See the remarks on the maxim, *Optimus interpres rerum usus*, *post*, Chap. X.

(*b*) Co. Litt. 147. a.; 7 Rep. 103; *per* Kelynge, C.J., *Lanyon* v. *Carne*, 2 Saunds. R. 167. See *Jesse* v. *Roy*, 1 Cr., M. & R. 316.

such rent be in arrear in the manor of S., this will not amount to a grant of rent out of the manor of S. for the rent is granted to be issuing out of the manor of D., and the parties have expressly limited out of what land the rent shall issue, and upon what land the distress shall be taken (*c*).

It may, moreover, be laid down as a general rule, applicable as well to cases in which a written instrument is required by law, as to those in which it is not, that where such instrument appears on the face of it to be complete, parol evidence is inadmissible to vary or contradict the agreement, *ex. gr.*, to show that the word "and" was inserted in it by mistake (*d*): in such cases the Court will look to the written contract, in order to ascertain the meaning of the parties, and will not admit the introduction of parol evidence, to show that the agreement was in reality different from that which it purports to be (*e*). And, therefore, where a charter-party provided that the vessel was to proceed to a named port or so near thereunto as she could safely get always afloat, evidence of a custom of the port for vessels to be lightened in the roads before proceeding into the harbour was held inadmissible in an action by the charterer against the shipowner for not lightening the vessel, but proceeding instead to the nearest safe port to that named in the charter-party, on the ground that such a custom would vary the express terms of the charter (*f*).

Although, moreover, it has been said that a somewhat strained interpretation of an instrument may be admis-

(*c*) Co. Litt. 147. a.

(*d*) *Hitchin* v. *Groom*, 5 C. B. 515.

(*e*) *Per* Bayley and Holroyd, JJ., *Williams* v. *Jones*, 5 B. & C. 108; *Spartali* v. *Benecke*, 10 C. B. 212.

(*f*) *The Alhambra*, 6 P. D. 68; 50 L. J. P. D. 36.

sible where an absurdity would otherwise ensue, yet, if the intention of the parties is not clear and plain, but *in equilibrio*, the words shall receive their more natural and proper construction (*g*).

Remarks in *Shore* v. *Wilson*.

The general rule, observes a learned judge, I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict plain common meaning of the words themselves; and that, in such case, evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible (*h*); therefore words deleted from a document and initialed cannot be looked at for the purpose of arriving at the intention of the parties (*i*). The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception from—or, perhaps, to speak more precisely, not so much an exception from, as a corollary to—the general rule above stated, that, where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding

(*g*) *Earl of Bath's case*, Cart. R. 108, 109, adopted 1 Fonbl. Eq., 5th ed., 445, n.

(*h*) *Per* Tindal, C.J., *Shore* v. *Wilson*, 5 Scott, N. R. 1037. For an instance of the application of this rule to a will, see *Doe* d. *Oxenden* v. *Chichester*, 3 Taunt. 147; S. C. (affirmed in error), 4 Dow. 65; cited and explained, Wigram, Extrin. Evid., 3rd ed., 77.

(*i*) *Inglis* v. *Butterly*, 3 App. Cas. 552.

circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party (*k*); and although parol evidence cannot be used to add to or detract from the description in a deed, or to alter it in any respect, such evidence is always admissible to show the condition of every part of the property and all other circumstances necessary to place the Court, when it construes an instrument, in the position of the parties to it, so as to enable the Court to judge of the meaning of the instrument (*l*). "You may," observes *Coleridge*, J. (*m*), with reference to a guarantee under the old law (*n*), "explain the meaning of the words used by any legal means. Of such legal means, one is to look at the situation of the parties. Till you have done that, it is a fallacy to say that the language is ambiguous: that which ends in certainty is not ambiguous."

Cases in illustration.

The following cases may be mentioned as falling within the scope of the preceding remarks: 1st, where the instrument is in a foreign language, in which case the jury must ascertain the meaning of the terms upon the evidence of persons skilled in the particular language (*o*); 2ndly, ancient words may be explained by contemporaneous usage; 3rdly, if the instrument be a mercantile contract, the meaning of the terms must be ascertained

(*k*) *Per* Tindal, C.J., 5 Scott, N. R. 1037, 1038; *Montefiore* v. *Lloyd*, 15 C. B. N. S. 203.

(*l*) *Baird* v. *Fortune*, 4 Macq. H. L. 127 at p. 149; *Magee* v. *Lavell*, L. R. 9 C. P. 107, 112.

(*m*) *Bainbridge* v. *Wade*, 16 Q. B. 100.

(*n*) See, now, stat. 19 & 20 Vict. c. 97, s. 3.

(*o*) As to this proposition, see 2 Phill. Ev., 10th ed., 366.

by the jury according to their acceptation amongst merchants; 4thly, if the terms are technical terms of art, their meaning must, in like manner, be ascertained by the evidence of persons skilled in the art to which they refer. In such cases, the Court may at once determine, upon the inspection of the instrument, that it belongs to the province of the jury to ascertain the meaning of the words, and, therefore, that, in the inquiry, extrinsic evidence to some extent must be admissible (*p*).

It may be scarcely necessary to observe, that the maxim under consideration applies equally to the interpretation of an Act of Parliament; the general rule being that *a verbis legis non est recedendum* (*q*). A court of law will not make any interpretation contrary to the express letter of a statute; for nothing can so well explain the meaning of the makers of the Act as their own direct words, since *index animi sermo*, and *maledicta expositio quæ corrumpit textum* (*r*); it would be dangerous to give scope for making a construction in any case against the express words, where the meaning of the makers is not opposed to them, and when no inconvenience will follow from a literal interpretation (*s*). "Nothing," observed Lord *Denman*, C. J. in a recent case (*t*), "is more unfortunate than a disturbance of the plain language of the legislature, by the attempt to use equivalent terms."

(*p*) *Per* Erskine, J., 5 Scott, N. R. 988; *per* Parke, B., *Clift* v. *Schwabe*, 3 C. B. 469, 470. As to the construction of a settlement in equity, see, *per* Lord Campbell, *Evans* v. *Scott*, 1 H. L. Cas. 66.

(*q*) 5 Rep. 119; cited, Wing. Max., p. 25.

(*r*) 4 Rep. 35; 2 Rep. 24; 11 Rep. 34; Wing. Max., p. 26.

(*s*) *Eldrich's case*, 5 Rep. 119; cited, Arg. *Gaunt* v. *Taylor*, 3 Scott, N. R. 709.

(*t*) *Everard* v. *Poppleton*, 5 Q. B. 184; *per* Coltman, J., *Gadsby* v. *Barrow*, 8 Scott, N. R. 804.

CERTUM EST QUOD CERTUM REDDI POTEST.—(*Noy, Max., 9th ed.*, 265.)—*That is sufficiently certain which can be made certain.*

General application of rule.

The above maxim, which sets forth a rule of logic as well as of law, is peculiarly applicable in construing a written instrument. For instance, although every estate for years must have a certain beginning and a certain end, "albeit there appear no certainty of years in the lease, yet, if by reference to a certainty it may be made certain, it sufficeth" (*u*); and, therefore, if a man make a lease to another for so many years as J. S. shall name, this is a good lease for years; for though it is at present uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. So, if a parson makes a lease for twenty or more years, if he shall so long live, or if he shall so long continue parson, it is good, for there is a certain period fixed, beyond which it cannot last, though it may determine sooner on the death of the lessor, or his ceasing to be parson (*x*).

Lease.

It is true, said Lord *Kenyon*, C. J., that there must be a certainty in the lease as to the commencement and duration of the term, but that certainty need not be ascertained at the time; for if, in the fluxion of time, a day will arrive which will make it certain, that is sufficient. As, if a lease be granted for twenty-one years, after three lives in being, though it is uncertain at first when that term will commence, because those lives are in being, yet when they die it is reduced to a certainty, and *Id certum est quod certum reddi potest*, and such terms

(*u*) Co. Litt. 45. b.
(*x*) 2 Com. by Broom & Hadley, 279, 280; 6 Rep. 35; Co. Litt. 45. b.

are frequently created for raising portions for younger children (*y*). But where an agreement for a lease contained no mention of the date from which the lease was to commence, it was held that it was not to be inferred that it commenced from the date of the agreement, in the absence of language in it pointing to that conclusion, and that therefore it failed to satisfy the Statute of Frauds (*z*).

Again, it is a rule of law, that, "no distress can be taken for any services that are not put into certainty nor can be reduced to any certainty, for *Id certum est quod certum reddi potest*" (*a*); and, accordingly, where land is demised at a rent which is capable of being reduced to a certainty, the lessor will be entitled to distrain for the same (*b*).

Office of habendum.

The office of the *habendum* in a deed is to limit, explain, or qualify the words in the premises; but if the words of the *habendum* are manifestly contradictory and repugnant to those in the premises, they must be disregarded (*c*).

Uncertainty.

A deed shall be void if it be totally uncertain; but if the King's grant refers to another thing which is certain, it is sufficient; as, if he grant to a city all liberties which London has, without saying what liberties London has (*d*).

Agreement.

An agreement in writing for the sale of a house, did not by description ascertain the particular house, but it referred to the deeds as being in the possession of A. B., named in the agreement. The Court held the agreement

(*y*) *Goodright* d. *Hall* v. *Richardson*, 3 T. R. 463.

(*z*) *Marshall* v. *Berridge*, 19 Ch. Div. 233.

(*a*) Co. Litt. 96. a., 142. a.; *Parke* v. *Harris*, 1 Salk. 262.

(*b*) *Daniel* v. *Gracie*, 6 Q. B. 145; *Pollitt* v. *Forrest*, 11 Q. B. 949. As to a feoffment of lands, see Co. Litt. 6. a.; and *Maughan* v. *Sharpe*, 17 C. B. N. S. 443.

(*c*) *Doe* d. *Timmis* v. *Steele*, 4 Q. B. 663.

(*d*) Com. Dig., "*Grant*" (F. 14). (G. 5); Finch, Law, 49.

sufficiently certain, inasmuch as it appeared upon the face of the agreement that the house referred to was the house of which the deeds were in the possession of A. B., and, consequently, the house might easily be ascertained before the Master, and *Id certum est quod certum reddi potest* (*e*).

Additional instances.

Again, the word "certain" must, in a variety of cases, where a contract is entered into for the sale of goods, refer to an indefinite quantity at the time of the contract made, and must mean a quantity which is to be ascertained according to the above maxim (*f*).

And where the law requires a particular thing to be done, but does not limit any period within which it must be done, the act required must be done within a reasonable time; and a reasonable time is capable of being ascertained by evidence, and, when ascertained, is as fixed and certain as if specified by Act of Parliament (*g*).

Where it was awarded that the costs of certain actions should be paid by the plaintiff and defendant in specified proportions, the award was held to be sufficiently certain, since it would become so upon taxation of costs by the proper officer (*h*). By the Act 3 & 4 Wm. IV., c. 42, s. 28, interest may be given by the jury upon all debts, &c., pay-

(*e*) *Owen* v. *Thomas*, 3 My. & K. 353.

(*f*) *Per* Lord Ellenborough, C.J., *Wildman* v. *Glossop*, 1 B. & Ald. 12.

(*g*) See *per* Lord Ellenborough, C.J., *Palmer* v. *Moxon*, 2 M. & S. 50.

(*h*) *Cargey* v. *Aitcheson*, 2 B. & C. 170. See *Pedley* v. *Goddard*, 7 T. R. 73; *Wood* v. *Wilson*, 2 Cr. M. & R. 241; *Waddle* v. *Downman*, 12 M. & W. 562; *Smith* v. *Hartley*, 10 C. B. 800, 805; *Graham* v. *Darvey*, 6 C. B. 539; *Holdsworth* v. *Barsham*, 2 B. & S. 480.

The maxim *supra* was applied to a valuation in *Gordon* v. *Whitehouse*, 18 C. B. 747, 753—to an indenture of apprenticeship in *Reg.* v. *Wooldale*, 6 Q. B. 549, 566. It may also be applicable in determining whether an action of *debt* will lie under given circumstances; see *Barber* v. *Butcher*, 8 Q. B. 863, 870.

able at a certain time. The plaintiff had agreed to supply the defendant with certain furniture upon the terms that payment was to be made, one-third in cash, as soon as the goods and invoices were delivered, and the balance in bills at six and twelve months. An action being brought for the one-third cash which the defendant had failed to pay, interest was claimed from the date when the goods were delivered. The Court (*Blackburn*, J., dissenting) allowed interest, considering the statute satisfied, if an event be named on which payment is to be made, and that the time of payment was fixed as being the time when the goods and invoices were delivered to the defendant (*i*).

UTILE PER INUTILE NON VITIATUR. (3 *Rep.* 10.)—*Surplusage does not vitiate that which in other respects is good and valid.*

It is a rule of extensive application with reference to the construction of written instruments, and in the science of pleading, that matter which is mere surplusage may be rejected, and does not vitiate the instrument or pleading in which it is found—*Surplusagium non nocet* (*k*) is the maxim of our law.

(*i*) *Duncombe* v. *Brighton Club Co.*, L. R. 10 Q. B. 371; 44 L. J. Q. B. 216; *Grath* v. *Ross*, 44 L. J. C. P. 315. See, however, *Merchant Shipping Co.* v. *Armitage*, L. R. 9 Q. B. 99, 114.

(*k*) Branch, Max., 5th ed., 216; *Non solent quæ abundant vitiare scripturas*, D. 50. 17. 94.

"Surplusage (in pleading) is something that is altogether foreign and inapplicable:" *per* Maule, J., *Aldis* v. *Mason*, 11 C. B. 139. See, also, as to surplusage, Shep. Touch. 236; cited, *per* Williams, J., *Janes* v. *Whitbread*, 11 C. B. 412; *Maclae* v. *Sutherland*, 3 E. & B. 1, 33, illustrates the maxim *supra*.

Examples. Deed.

Accordingly, where words of known signification are so placed in the context of a deed that they make it repugnant and senseless, they are to be rejected equally with words of no known signification (*l*). It is also a rule in conveyancing, that, if an estate be granted in any premises, and that grant is express and certain, the *habendum*, although repugnant to the deed, shall not vitiate it. If, however, the estate granted in the premises be not express, but arise by implication of law, then a void *habendum*, or one differing materially from the grant, may defeat it (*m*).

Award.

A cause and all matters of difference were referred to the arbitration of three persons, the award of the three, or of any two of them, to be final. The award purported on the face of it to be made by all three, but was executed by two only of the arbitrators, the third having refused to sign it when requested so to do. This award was held to be good as the award of the two, for the statement that the third party had concurred, might, it was observed, be treated as mere surplusage, the substance of the averment being that two of the arbitrators had made the award (*n*).

So where the directors of an unincorporated and unregistered joint-stock company issued promissory notes

(*l*) Vaugh. R. 176. See *Whittome* v. *Lamb*, 12 M. & W. 813.

(*m*) Arg., *Goodtitle* v. *Gibbs*, 5 B. & C. 712, 713, and cases there cited; Shep. Touch. 112, 113, Hobart, 171. See, also, instances of the application of this rule to an order of removal, *Reg.* v. *Rotherham*, 3 Q. B. 776, 782; *Reg.* v. *Silkstone*, 2 Q. B. 422; to an order under 2 & 3 Vict. c. 85, s. 1, *Reg.* v. *Goodall*, 2 Dowl. P. C., N. S., 382; *Reg.* v. *Oxley*, 6 Q. B. 256; to a conviction, *Chaney* v. *Payne*, 1 Q. B. 722; to a notice of objection under 6 & 7 Vict. c. 18, *Allen*, app., *House*, resp., 8 Scott, N. R. 987; cited, Arg., 2 C. B. 9; to an information, *A.-G.* v. *Clerc*, 12 M. & W. 640.

(*n*) *White* v. *Sharp*, 12 M. & W. 712. See, also, *per* Alderson, B., *Wynne* v. *Edwards*, 12 M. & W. 712; *Harlow* v. *Read*, 1 C. B. 733.

which purported to bind the shareholders severally, as well as jointly, it was held that it was beyond the power of the directors to make the shareholders severally liable upon the notes, but that the expression in the notes, by which a separate liability was sought to be created, might easily be detached in construing it and taken *pro non scripta* (*o*).

Application of rule in pleading.

The above maxim, however, applies peculiarly to pleading; in which it is a rule, that matter immaterial cannot operate to make a pleading double, and that mere surplusage does not vitiate a plea, and may be rejected (*p*).

Indictment.

Lastly, with respect to an indictment, it is laid down, that an averment, which is altogether superfluous, may here be rejected as surplusage (*q*). Accordingly, where a criminal information was laid against a member of the legislative Assembly of the Colony of New South Wales, for an assault on a member, committed within the precincts of the House, while the Assembly was sitting, which information averred that such assault was in contempt of the said Assembly (that being in itself no offence), it was held that the information was good, as the alleged contempt of the Assembly could be treated as surplusage, and the information sustainable for an assault (*r*). If, however, an averment be part of the description of the offence, or be embodied by reference in such description, it cannot be so rejected, and its intro-

(*o*) *Maclae* v. *Sutherland*, 3 Ell. & Bl. 1.

(*p*) Co. Litt. 303, b.; Steph. Pl., 6th ed., 310, 341.

Ring v. *Roxburgh*, 2 Cr. & J. 418 (cited *per* Rolfe, B., *Duke* v. *Forbes*, 1 Exch. 356), is an instance of the rejection of surplusage in a declaration.

(*q*) *Reg.* v. *Parker*, L. R. 1 C. C. 225.

(*r*) *Attorney-General of New South Wales* v. *Macpherson*, L. R. 3 P. C. 268.

duction may, unless an amendment be permitted, be fatal (*s*).

FALSA DEMONSTRATIO NON NOCET. (6 *T. R.* 676.)—*Mere false description does not make an instrument inoperative.*

Definition of *falsa demonstratio*, and rule respecting it.

Falsa demonstratio may be defined to be an erroneous description of a person or thing in a written instrument (*t*); and the above rule respecting it may be thus stated and qualified: as soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by the particular instrument, a subsequent erroneous addition will not vitiate it (*u*): *quicquid demonstratæ rei additur satis demonstratæ frustra est* (*x*). The characteristic of cases within the principal maxim being that "the description so far as it is false applies to no subject at all (*y*), and so far as it is true applies to one only." "I have always understood," observes Lord *Kenyon*, speaking with reference to a will (*z*), "that such

(*s*) Dickins. Quart. Sess., 5th ed., by Mr. Serjt. Talfourd, 175.

(*t*) See Bell, Dict. and Dig. of Scotch Law, 420; *Spooner* v. *Payne*, 4 C. B. 328, 330; *Robinson* v. *Marq. of Bristol*, 11 C. B. 208; S. C. (in error), *Id.* 241.

(*u*) *Per* Parke, B., *Llewellyn* v. *Earl of Jersey*, 11 M. & W. 189; recognized in *Barton* v. *Dawes*, 10 C. B. 261, 266; *Travers* v. *Blundell*, 6 Ch. Div. 436; Judgm., *Morrell* v. *Fisher*, 4 Exch. 604; recognized in *Wood* v. *Rowcliffe*, 6 Exch. 407, 410; *Harrison* v. *Hyde*, 4 H. & N. 805; *Josh* v. *Josh*, 5 C. B. N. S. 454; Com. Dig., "*Fait*" (E. 4); *Cambridge* v. *Rous*, 8 Ves. 12; *Enohin* v. *Wylie*, 10 H. L. Cas. 1.

(*x*) D. 33. 4. 1, § 8.

(*y*) Judgm., *Webber* v. *Stanley*, 16 C. B. N. S. 755.

(*z*) *Thomas* v. *Thomas*, 6 T. R. 676. See, also, *Mosley* v. *Massey*, 8 East, 149; *per* Parke, J., *Doe* d. *Smith* v. *Galloway*, 5 B. & Ad. 51; followed in *Dyne* v. *Nutley*, 14 C. B. 122; *per* Littledale, J., *Doe* d. *Ashforth* v. *Bower*, 3 B. & Ad. 459; *Gynes* v. *Kemsley*, 1 Freem. 293;

falsa demonstratio should be superadded to that which was sufficiently certain before, there must *constat de personâ;* and if to that an inapt description be added, though false, it will not avoid the devise." "I agree," observes *Patteson*, J. (*a*), "to the doctrine that *Falsa demonstratio non nocet:* but that is only where the words of the devise, exclusive of that *falsa demonstratio*, are sufficient of themselves to describe the property intended to be devised; reference being had, if necessary to the situation of the premises, to the names by which they have been known, or to other circumstances properly pointing to the meaning of the description in the will." And again, the maxim as to *falsa demonstratio*, says Lord *Westbury* (*b*), "is applicable to a case where some subject matter is devised as a whole under a denomination, which is applicable to the entire land, and then the words of description that include and denote the entire subject-matter are followed by words which are added on the principle of enumeration, but do not completely enumerate and exhaust all the particulars which are comprehended and included within the antecedent universal or generic denomination. Then the ordinary principle and rule of law which is perfectly consistent with common sense and reason is this: that the entirety which has been expressly and definitely given, shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars of the specific gift" (*c*).

The foregoing observations are, in the main, applicable

Hobart, 32, 171; *Greene* v. *Armsteed*, *Id.* 65; Vin. Abr., "*Devise*" (T. b.), pl. 4.

(*a*) *Doe* d. *Hubbard* v. *Hubbard*, 15 Q. B. 241.

(*b*) *West* v. *Lawday*, 11 H. L. Cas. 384.

(*c*) See, also, *per* Lefroy, C.J., *Roe* v. *Lidwell*, 11 Ir. C. L. R. 326, cited Arg. *Skull* v. *Glenister*, 16 C. B. N. S. 89.

not only to wills, but to other instruments (*d*); so that the characteristic of cases strictly within the above rule is this, that the description, so far as it is false, applies to no subject, and, so far as it is true, it applies to one subject only; and the Court, in these cases, rejects no words but those which are shown to have no application to any subject (*e*). The following case shows the anxiety of the Court to give effect to a testator's intention, where the subject-matter of the bequest is inaccurately described, but when explained by extrinsic evidence may be made sufficiently certain to enable the Court to act upon it. A testator by his will gave an annuity of £21 per annum, which "I purchased of," and received from "Mr. J. G." The testator had no annuity of that amount, but he had an annuity of £46 which he had purchased from J. G., and had insured J. G.'s life for the amount of the purchase-money, the yearly premium on which came to £25, thus leaving a clear sum of £21 as representing the beneficial interest in the annuity; it was held, that the entire annuity of £46 per annum passed by the above bequest (*f*).

Where accordingly a question involving the legal doctrine now before us arises upon a will, we must inquire is there a devise of a thing certain? If there be, the addition of an untrue circumstance will not vitiate the devise (*g*).

(*d*) *London Grand Junction R. C.* v. *Freeman*, 2 Scott, N. R. 705, 748. See *Reg.* v. *Wilcock*, 7 Q. B. 317; *Jack* v. *M'Intyre*, 12 Cl. & Fin. 151; *Ormerod* v. *Chadwick*, 16 M. & W. 367; followed, *per* Wightman, J., *Reg.* v. *Stretfield*, 32 L. J., M. C., 236.

(*e*) See Wigram, Ex. Ev., 3rd ed., 142, 165; Judgm., *Morrell* v. *Fisher*, 4 Exch. 604; *Mann* v. *Mann*, 14 Johns. (U.S.), R. 1.

(*f*) *Purchase* v. *Shallis*, 14 Jur. 403.

(*g*) Plowd. 191; cited and adopted Judgm., *Nightingall* v. *Smith*, 1

In the case of *Selwood* v. *Mildmay* (*h*), the testator devised to his wife part of his stock in the £4 per Cent. Annuities of the Bank of England, and it was shown by parol evidence, that at the time he made his will, he had no stock in the £4 per Cent. Annuities, but that he had had some, which he had sold out, and of which he had invested the produce in Long Annuities: it was held in this case that the bequest was, in substance, a bequest of stock, using the words as a denomination, not as the identical *corpus* of the stock; and as none could be found to answer the description but the Long Annuities, it was decided that such stock should pass, rather than the will be altogether inoperative. *Selwood* v. *Mildmay.*

A testatrix, by her will, bequeathed several legacies to different individuals, of £3 per Cent. Consols standing in her name in the books of the Bank of England; but, at the date of her will, as well as at her death, she possessed no such stock, nor stock of any kind whatever. It was held that the ambiguity in this case being latent, evidence was admissible to show how the mistake of the testatrix arose, and to discover her intention (*i*).

But where a testatrix died possessed of property in Consols, Reduced Annuities, and Bank Stock, and by her will bequeathed "the whole of my fortune now standing in the Funds to E. S.": Held, that the Bank Stock did not pass (*k*).

On the same principle, in the case of a lease of a

Exch. 886; and, *per* Parke, B., *Morrell* v. *Fisher*, 4 Exch. 599. And, as illustrating the passage above cited, compare *Doe* d. *Hubbard* v. *Hubbard*, 15 Q. B. 227, with *Doe* d. *Compton* v. *Carpenter*, 16 *Id.* 181.

(*h*) 3 Ves. jun. 306.

(*i*) *Lindgren* v. *Lindgren*, 9 Beav. 358; citing *Selwood* v. *Mildmay*, 3 Ves. 306; *Miller* v. *Travers*, 8 Bing. 244; and *Doe* d. *Hiscocks* v. *Hiscocks*, 5 M. & W. 363.

(*k*) *Slingsby* v. *Grainger*, 7 H. L. Cas. 273.

portion of a park, described as being in the occupation of S., and lying within certain specified abuttals, with all houses, &c., belonging thereto, and "which are now in the occupation of S.": it was held, that a house, situated within the abuttals, but not in the occupation of S., would pass (*l*). So, where an estate is devised, called A., and described as in the occupation of B., and it is found that, though there is an estate called A., yet the whole is not in B.'s occupation (*m*); or, where an estate is devised to a person whose surname or Christian name is mistaken, or whose description is imperfect or inaccurate: in these cases parol evidence is admissible to show what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence (*n*). Thus, a devise of all the testator's freehold houses in Aldersgate Street, where, in fact, he had no freehold, but had leasehold houses, was held to pass the latter, the word "freehold" being rejected (*o*); the rule being, that, where any property described in a will is sufficiently ascertained by the description, it passes under the devise, although *all* the particulars stated in the will with reference to it may not be true (*p*). In other words, *nil facit error nominis cum de corpore vel per-*

Rule applicable to will.

(*l*) *Doe* d. *Smith* v. *Galloway*, 5 B. & Ad. 43; *Beaumont* v. *Field*, 1 B. & Ald. 247; 3 Preston. Abstr. Tit. 206; *Doe* d. *Roberts* v. *Parry*, 13 M. & W. 356.

(*m*) *Goodtitle* v. *Southern*, 1 M. & S. 299.

(*n*) Judgm., *Miller* v. *Travers*, 8 Bing. 248; *Doe* d. *Hiscocks* v. *Hiscocks*, 5 M. & W. 363; *Rishton* v. *Cobb*, 5 My. & Cr. 145.

(*o*) *Day* v. *Trig*, 1 P. Wms. 286; *Doe* d. *Dunning* v. *Cranstoun*, 7 M. & W. 1. See *Parker* v. *Marchant*, 6 Scott, N. R. 485; *Goodman* v. *Edwards*, 2 My & K. 759; *Hobson* v. *Blackburn*, 1 My. & K. 571.

(*p*) *Per* Parke, B., *Doe* d. *Dunning* v. *Cranstoun*, 7 M. & W. 10; *Newton* v. *Lucas*, 1 My. & Cr. 391.

sonâ constat (*q*). "It is fit, and therefore required," observes Mr. Preston (*r*), "that things should be described by their proper names; but, though this be the general rule, it admits of many exceptions, for things may pass under any denomination by which they have been usually distinguished."

Blundell v. Gladstone.

In a modern case (*s*), where property was devised to the second son of *Edward* W., of L., this devise was held, upon the context of the will, and upon extrinsic evidence as to the state of the W. family, and the degree of the testator's acquaintance with the different members of it, to mean a devise to the second son of *Joseph* W., of L., although it appeared that there was in fact a person named *Edward Joseph* W., the eldest son of *Joseph* W., who resided at L., and who usually went by the name of *Edward* only; and it was remarked, that, according to the general rule of law and of construction, if there had been two persons, each fully and accurately answering the whole description, evidence might be received, or arguments from the language of the will, and from circumstances, might be adduced to show to which of those persons the will applied; but that where one person, and one only, fully and accurately answers the whole description, the Court is bound to apply the will to that person. It was, however, further observed, that an exception would occur in applying the above rule, where it would lead to a construction of a devise manifestly contrary to what was the intention of the testator, as expressed by his will, and that the rule must be rejected as inapplicable

(*q*) See *Janes* v. *Whitbread*, 11 C. B. 406; and *Stanley* v. *Stanley*, 2 J. & H. 491.

(*r*) 3 Prest. Abst. Tit. 206; 6 Rep. 66.

(*s*) *Blundell* v. *Gladstone*, 1 Phil. 279; S. C., *nom. Lord Camoys* v. *Blundell*, 1 H. L. Cas. 778.

to a case in which it would defeat instead of promoting the object for which all rules of construction have been framed (*t*).

In accordance with the spirit of the maxim under consideration, where a judge's order for the admission of documents in evidence referred to a "document mentioned in a certain notice served by the defendant's attorney or agent, dated the 4th day of March, 1845," and the notice produced at the trial was dated the 1st of March, but the plaintiff's attorney stated that it was the only notice served in the cause, the judge at the trial allowed the document to be read; and the Court held that it was admissible, on the ground that, as only one notice had been served, the misdescription was merely *Falsa demonstratio quæ non nocet* (*u*).

Restriction of rule.

But, although an averment to take away surplusage is good, yet it is not so to increase that which is defective in the will of the testator (*x*); and, it has been observed (*y*), that there "is a diversity where a certainty is added to a thing which is uncertain, and where to a thing certain."

Miller v. *Travers.*

In a leading case on this subject (*z*), testator devised all his freehold and real estates in the county of L. and city of L. It appeared that he had no estates in the county of L.,—a small estate in the city of L., inadequate

(*t*) 1 Phil. R. 285, 286.

(*u*) *Bittleston* v. *Cooper*, 14 M. & W. 399.

(*x*) *Per* Anderson, C. J., Godbolt, R., 131, recognized 8 Bing. 253; *per* Lord Eldon, C., 6 Ves. jun. 397.

(*y*) See, *per* Lord Ellenborough, C. J., *Doe* d. *Harris* v. *Greathed*, 8 East, 103: Hob. R., 172; *Doe* d. *Renow* v. *Ashley*, 10 Q. B. 663.

(*z*) *Miller* v. *Travers*, 8 Bing. 244, and the observations on this decision by Sir James Wigram, in the treatise already referred to, and, *per* Lord Brougham, *Mostyn* v. *Mostyn*, 5 H. L. Cas. 168.

to meet the charges in the will,—and estates in the county of C., not mentioned in the will. It was held, that parol evidence was inadmissible to show the testator's intention that his real estates in the county of C. should pass by his will. For it was observed, that this would be not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it was to be collected from the will itself, to the existing state of his property: it would be calling in aid extrinsic evidence to introduce into the will an intention not apparent upon the face of it. It would be not simply removing a difficulty arising from a defective or mistaken description, it would be making the will speak upon a subject on which it was altogether silent, and would be the same thing in effect as the filling up a blank which the testator might have left in his will: it would amount, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he was supposed to have omitted (*a*). If, then, with all the light which can be thrown upon the instrument by evidence as to the meaning of the description, there appears to be no person or thing answering in any respect thereto, it seems, that, to admit evidence of a different description, being intended to be used by the writer, would be to admit evidence for the substitution of one person or thing for another, in violation of the rule, that an averment is not good to increase that which is defective in a written instrument (*b*); accordingly where a testator by his will appointed Francis Courtenay Thorpe, gentleman, as one of his executors, and there was living a youth of twelve years of age who answered the description, evidence to show that the tes-

(*a*) 8 Bing. 249, 250. (*b*) 2 Phil. Evid., 10th ed., 345.

tator referred to the father of the youth was not admitted (*c*).

Præsentia corporis tollit errorem nominis.

Included in the maxim as to *falsa demonstratio*, is the rule laid down by Lord *Bacon* in these words: *Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis* (*d*); and which is thus illustrated by him:—"If I give a horse to J. D., when present, and say to him, 'J. S. take this,' it is a good gift, notwithstanding I call him by a wrong name. So, if I say to a man, 'Here, I give you my ring with the ruby,' and deliver it, and the ring is set with a diamond, and not a ruby, yet this is a good gift. In like manner, if I grant my close, called 'Dale,' in the parish of Hurst, in the county of Southampton, and the parish extends also into the county of Berks, and the whole close of Dale lies, in fact, in the last-mentioned county, yet this false addition will not invalidate the grant (*e*). Moreover, where things are particularly described, as, 'My box of ivory lying in my study, sealed up with my seal of arms,' 'My suit of

(*c*) *R.* v. *Peel*, L. R. 2 P. & D. 46.

(*d*) Bac. Max., reg. 24; 6 Rep. 66; 1 Lord Raym. 303; 6 T. R. 675; *Doe* v. *Huthwaite*, 3 B. & Ald. 640; *per* Gibbs, C.J., S. C., 8 Taunt. 313; *Nicoll* v. *Chambers*, 11 C. B. 996, and *Hopkins* v. *Hitchcock*, 14 C. B. N. S. 65, 73, where there was a misdescription of property in a contract of sale. As to the maxim *supra*, see the remarks of Lord Brougham in *Lord Camoys* v. *Blundell*, 1 H. L. Cas. 792, 793; *Mostyn* v. *Mostyn*, 5 H. L. Cas. 155; S. C., 3 De G. M. & G. 140.

In *Drake* v. *Drake*, 8 H. L. Cas. 179, Lord Campbell, C., observes, "There is a maxim that the name shall prevail against an error of demonstration; but then you must first show that there is an error of demonstration, and until you have shown that, the rule *Veritas nominis tollit errorem demonstrationis* does not apply. I think that there is no presumption in favour of the name more than of the demonstration."

The maxim *supra* was applied *per* Byles, J., *Way* v. *Hearn*, 13 C. B. N. S. 307.

(*e*) See *Anstee* v. *Nelms*, 1 H. & N. 225; *per* Byles, J., *Rand* v. *Green*, 9 C. B. N. S. 477.

arras, with the story of the Nativity and Passion;' inasmuch as of such things there can only be a detailed and circumstantial description, so the precise truth of *all* the recited circumstances is not required; but, in these cases, the rule is, *ex multitudine signorum colligitur identitas vera;* therefore, though my box were not sealed, and though the arras had the story of the Nativity, and not of the Passion embroidered upon it, yet, if I had no other box and no other suit, the gifts would be valid, for there is certainty sufficient, and the law does not expect a precise description of such things as have no certain denomination. Where, however, the description applies accurately to some portion only of the subject-matter of the grant, but is false as to the residue, the former part only will pass; as, if I grant all my land in D., held by J. S., which I purchased of J. N., specified in a demise to J. D., and I have land in D., to a part of which the above description applies, and have also other lands in D., to which it is in some respects inapplicable, this grant will not pass all my land in D., but the former portion only" (*f*). So, if a man grant all his estate in his own occupation in the town of W., no estate can pass except what is in his own occupation and is also situate in that town (*g*).

In a recent important case (*h*) connected with criminal procedure, the maxim *Præsentia corporis tollit errorem nominis* was judicially applied, the facts being as under:—Preparatory to a trial for murder, the name of A., a juror on the panel, was called, and B., another juror, on

(*f*) Bac. Works, vol. 4, pp. 73, 75, 77, 78; Bac. Abr., "*Grants*" (H. 1); Toml. Law Dict. "*Gift;*" Noy, Max., 9th ed., p. 50.

(*g*) 7 Johns. (U.S.), R. 224.

(*h*) *Reg.* v. *Mellor*, 27 L. J., M. C. 121.

the same panel, appeared, and by mistake answered to the name of A., and was sworn as a juror. A conviction ensued, which a majority of the Court for the Consideration of Crown Cases Reserved held ought not to be set aside, one of the learned Judges thus founding his opinion upon the maxim cited:—"The mistake is not a mistake of the man, but only of his name. The very man who, having been duly summoned, and being duly qualified, looked upon the prisoner, and was corporeally presented and shown to the prisoner for challenge, was sworn and acted as a juryman. At bottom the objection is but this, that the officer of the Court, the juryman being present, called and addressed him by a wrong name. Now, it is an old and rational maxim of law, that where the party to a transaction, or the subject of a transaction, are either of them actually and corporeally present, the calling of either by a wrong name is immaterial. *Præsentia corporis tollit errorem nominis.* Lord *Bacon*, in his maxims (*i*), fully explains and copiously illustrates this rule of law and good sense, and shows how it applies, not only to persons, but to things. In this case, as soon as the prisoner omitted the challenge, and thereby in effect said, 'I do not object to the juryman there standing,' there arose a compact between the Crown and the prisoner that the individual juryman there standing corporeally present should try the case. It matters not, therefore, that some of the accidents of that individual, such as his name, his address, his occupation, should have been mistaken. *Constat de corpore.*"

Rules as to construction of grants.

The rules, it has been remarked (*k*), which govern the construction of grants have been settled with the greatest wisdom and accuracy. Such effect is to be given to the

(*i*) *Ubi supra.*

(*k*) *Jackson* v. *Clark*, 7 Johns. (U.S.), R. 223, 224; recognised 18 *Id.* 84.

instrument as will effectuate the intention of the parties, if the words which they employ will admit of it, *ut res magis valeat quam pereat.* Again, if there are certain particulars once sufficiently ascertained which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not frustrate the grant (*l*). But when the description of the estate intended to be conveyed includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass except such as will agree with the description in every particular (*m*).

In *Doe* d. *Gains* v. *Rouse* (*n*), Lord *Bacon's* maxim above cited was felicitously applied. There the testator—having a wife *Mary*, to whom he was married in 1834, and who survived him—in 1840 went through the ceremony of marriage with a woman whose Christian name was *Caroline*, and who continued to reside with him as his wife to the time of his death, which took place in 1845. Shortly before his decease the testator by his will devised certain property to "*my dear wife Caroline*, her heirs, &c., absolutely." It was held that *Caroline* took under this devise the property in question. "The testator," observed *Maule*, J., "devises the premises in question to his dear wife Caroline. That is a devise to a person by name, and one which appears to be that of the lessor of the plaintiff. There is no competition with any one else of the same name, to whom it can be suggested that the will intended to refer. The only question is, whether the lessor of the plaintiff, not being the lawful wife of the testator, properly fills the description of his 'dear wife

(*l*) *Blayne* v. *Gold*, Cro. Car. 447, 473, where the rule was applied to a devise.

(*m*) 3 Atk. 9; Dyer, 50.

(*n*) 5 C. B. 422.

Caroline.' Formerly the name was held to be the important thing. This is shown by the 25th maxim of Lord *Bacon*, to which I have before adverted:—'*Veritas nominis tollit errorem demonstrationis.* So, if I grant land, *Episcopo nunc Londinensi qui me erudivit in pueritiâ*; this is a good grant, although he never instructed me.' That rule has no doubt been relaxed in modern times, and has given place to another, that the construction of the devise is to be governed by the evident intention of the testator. There are cases in which the Courts have gone some length in opposition to the actual words of the will; but always with a view to favouring the apparent or presumed intention of the testator. Here, however, the struggle against the old rule is not that the intention of the testator may be best effectuated by a departure from it, but to get rid of a devise to the person who was really intended to take. Here is a person fitly named, and there can be no reasonable doubt that she was the person intended. It being conceded that it was the testator's intention that *Caroline* should have the property, and he having mentioned her by an apt description, I see no ground for holding that because the words 'my dear wife' are not strictly applicable to her, the intention of the testator should fail and the property go to some one to whom he did not mean to give it. *Caroline* was *de facto* the testator's wife; and she lived with him as such down to the time of his death. It is possible that the *first* marriage may not have been a valid one. At all events, if *Mary* was his lawful wife, all that can be said is that the testator had been guilty of bigamy. It is not the case of a description that is altogether inapplicable to the party, but of a description that is in a popular sense applicable. The competition is between one whom the

testator clearly did mean, and another whom it is equally clear that he did not mean. Interpreting the language he has used in its proper and legitimate manner, and regard being had to the circumstances existing at the time of the execution of the will, there can be no doubt that the intention of the testator is best effectuated by holding that the lessor of the plaintiff is the person designated, and that apt words have been used to convey the property in question to her."

Legal intendment.

It is, lastly, a rule, which may be here noticed, that, *Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram* (*o*),—if it be doubtful upon the words, whether they import a false reference or description, or whether they be words of restraint, limiting the generality of the former name, the law will not intend error or falsehood (*p*)—"where words can be applied so as to operate on a subject-matter and limit the other terms employed in its description," or "where there is a subject-matter to which they all apply, it is not possible to reject any of those terms as a *falsa demonstratio*" (*q*). If, therefore, "I have some land wherein all these demonstrations are true, and some wherein part of them are true and part false, then shall they be intended words of true limitation, to pass only those lands wherein all those circumstances are true" (*r*); and if a man pass lands, describing them by particular

(*o*) Bac. Max., reg. 13.

(*p*) Bac. Max., reg. 13, cited 8 East, 104.

(*q*) *Per* Willes, J., *Smith* v. *Ridgway*, L. R. 1 Ex. 332–3; S. C., *Id.* 46; Judgm., *Webber* v. *Stanley*, 16 C. B. N. S. 698, 752, *et seq.*

(*r*) Bac. Max., reg. 13, *ad finem*; cited, *per* Parke, J., *Doe* d. *Ashforth* v. *Bower*, 3 B. & Ad. 459, 460; *Doe* d. *Chichester* v. *Ozenden*, 3 Taunt. 147; Judgm., *Morrell* v. *Fisher*, 4 Exch. 604; *per* Willes, J., *Josh* v. *Josh*, 5 C. B. N. S. 463.

references, all of which references are true, the Court cannot reject any one of them (*s*).

Rules as to wills re-stated.

Before concluding these remarks, it may be well to state shortly the rules respecting ambiguity and *falsa demonstratio*, in connection with the exposition of wills, which seem to be applicable to four classes of cases:—

1. Where the description of the thing devised, or of the devisee, is clear upon the face of the will, but, upon the death of the testator, it is found that there is more than one estate or subject-matter of devise, or more than one person whose description follows out and fills the words used in the will; in this case parol evidence is admissible to show what thing was intended to pass, or who was intended to take (*t*).

2. Where the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular: in which class of cases parol evidence is admissible to show what estate was intended to pass, and who was the devisee intended to take, provided there is a sufficient indication of intention appearing on the face of the will to justify the application of the evidence (*u*).

3. A third class of cases may arise, in which a judge, knowing *aliundé* for whom or for what an imperfect description was intended, would discover a sufficient certainty to act upon; although, if ignorant of the intention, he would be far from finding judicial certainty in the words of the devise; and here it would seem that evidence of intention would not be admissible, the description

(*s*) *Per* Le Blanc, J., *Doe* v. *Lyford*, 4 M. & S. 557.

(*t*) 8 Bing. 248.

(*u*) *Id.*

being, *as it stands*, so imperfect as to be useless, unless aided thereby (*x*).

4. It may be laid down as a true proposition, which is indeed included within that secondly above given, that, if the description of the person or thing be wholly inapplicable to the subject intended or said to be intended by it, evidence is inadmissible to prove whom or what the testator really intended to describe (*y*).

Lastly, we may observe that the maxim, *Falsa demonstratio non nocet*, which we have been considering, obtained in the Roman law (*z*); for we find it laid down in the Institutes, that an error in the proper name or in the surname of the legatee should not make the legacy void, provided it could be understood from the will what person was intended to be benefited thereby. *Si quidem in nomine, cognomine, prænomine legatarii testator erraverit, cum de personâ constat, nihilominus valet legatum* (*a*). So, it was a rule akin to the proceeding, that *falsâ demonstratione legatum non perimi* (*b*), as if the testator bequeathed his bondman, Stichus, whom he bought of Titius, whereas Stichus had been given to him or purchased by him of some other person (*c*); in such a case the misdescription would not avoid the bequest (*d*).

It is evident that the maxims above cited, and others to a similar purport which occur both in the civil law and in our own reports, are, in fact, deducible from those very

(*x*) See this subject considered, Wigram, Extrin. Ev., 3rd ed., 166, 167.

(*y*) Wigram, Extrin. Ev., 3rd ed., 163.

(*z*) See Phillimore, Roman Law, 35.

(*a*) I. 2. 20. 29; compare D. 30. 1. 4; also, 2 Domat. Bk. 2, tit. 1, s. 6, § 10, 19; *Ib.* s. 8, § 11.

(*b*) I. 2. 20. 30. See *Whitfield* v. *Clemment*, 1 Mer. 402.

(*c*) I. 2. 20. 30.

(*d*) *Id.*; Wood, Inst., 3rd ed., 165.

general principles with the consideration of which we commenced this chapter—*Benigné faciendæ sunt interpretationes, et verba intentioni non e contra debent inservire* (*e*).

VERBA GENERALIA RESTRINGUNTUR AD HABILITATEM REI VEL PERSONAM. (*Bac. Max. reg.* 10.)—*General words may be aptly restrained according to the subject-matter or person to which they relate* (*f*).

Rule as laid down and illustrated by Lord Bacon.

"It is a rule," observes Lord *Bacon* (*g*), "that the king's grant shall not be taken or construed to a special intent. It is not so with the grants of a common person, for they shall be extended as well to a foreign intent as to a common intent, but yet with this exception, that they shall never be taken to an impertinent or repugnant intent; for all words, whether they be in deeds or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter and the person." (*h*).

(*e*) It may probably be unnecessary to remind the reader that the cases decided with reference to the rule of construction considered in the preceding pages are exceedingly numerous, and that such only have been noticed as seemed peculiarly adapted to the purposes of illustration. A similar remark is equally applicable to the other maxims commented on in this chapter.

(*f*) *Per* Willes, J., *Moore* v. *Rawlins*, 6 C. B. N. S. 320; citing *Payler* v. *Homersham*, 4 M. & S. 423; and in *Chorlton* v. *Lings*, L. R. 4 C. P. 387.

General words may be controlled by the recital in an instrument. See *Bank of British North America* v. *Cuvillier*, 14 Moo., P. C. C. 187, and cases there cited.

(*g*) Bac. Max., reg. 10; 6 Rep. 62.

(*h*) The maxim *supra* was accordingly applied to restrain the words of a general covenant by a Railway Company to "efficiently work" a line demised to them—the covenant

Thus, if I grant common "in all my lands" in D., if I have in D. both open grounds and several, it shall not be stretched to common in my several grounds, much less in my garden or orchard. So, if I grant to J. S. an annuity of 10*l.* a year, "*pro concilio, impenso et impendendo*" (for past and future council), if J. S. be a physician, this shall be understood of his advice in physic, and, if he be a lawyer, of his council in legal matters (*i*)). And in accordance with the same principle a right of common of turbary claimed by prescription and user has been held to be restrained to those parts of the *locus in quo* in which it could be used (*k*).

Additional illustrations.

In accordance, likewise, with the above maxim—the subject-matter of an agreement is to be considered in construing the terms of it, and they are to be understood in the sense most agreeable to the nature of the agreement (*l*). If a deed relates to a particular subject only, general words in it shall be confined to that subject, otherwise they must be taken in their general sense (*m*). The words of the condition of a bond "cannot be taken at large, but must be tied up to the particular matters of the recital" (*n*), unless, indeed, the condition itself is

being construed "with a reference to the subject-matter and the character of the defendants." *West London R. C.* v. *London and North Western R. C.*, 11 C. B. 254, 356.

The maxim was applied to a policy of insurance, Arg., *Baines* v. *Holland*, 10 Exch. 805.

Though a release be general in its terms, its operation will, at law, in conformity with the doctrine recognized in courts of equity, be limited to matters contemplated by the parties at the time of its execution. *Lyall* v. *Edwards*, 6 H. & N. 337.

(*i*) Bac. Works, vol. 4, p. 46. See Com. Dig., "*Condition*" (K. 4).

(*k*) *Peardon* v. *Underhill*, 16 Q. B. 120.

(*l*) 1 T. R. 703.

(*m*) *Thorpe* v. *Thorpe*, 1 Lord Raym. 235; S. C., *Id.* 662.

(*n*) *Per* Eyre, J., Gilb., Cas. 240. See *Seller* v. *Jones*, 16 M. & W. 112, 118; *Stoughton* v. *Day*, Aleyn, 10; *Lord Arlington* v. *Merrick*, 2 Saund. 414; as to which, see *Mayor of Berwick* v. *Oswald*, 3 E. & B. 653;

manifestly designed to be extended beyond the recital (*o*);

Principles of construction.

and, further, it is a rule, that what is generally spoken shall be generally understood, *generalia verba sunt generaliter intelligenda* (*p*), unless it be qualified by some special subsequent words, as it may be (*q*); *ex. gr.*, the operative words of a bill of sale may be restricted by what follows (*r*).

Rules upon this subject.

In construing the words of any instrument, then, it is proper to consider, 1st, what is their meaning in the largest sense which, according to the common use of language, belongs to them (*s*); and, if it should appear that that sense is larger than the sense in which they must be understood in the instrument in question, then, 2ndly, what is the object for which they are used. They ought not to be extended beyond their ordinary sense in order to comprehend a case within their object, for that would be to give effect to an intention not expressed; nor can they be so restricted as to exclude a case both within their object and within their ordinary sense, without

S. C., 5 H. L. Cas. 856; *Kitson* v. *Julian*, 4 B. & B., 854, 858; *Napier* v. *Bruce*, 8 Cl. & Fin. 470; *North-Western R. C.* v. *Whinray*, 10 Exch. 77.

(*o*) *Sansom* v. *Bell*, 2 Camp. 39; Com. Dig., "*Parols*" (A. 19); *Evans* v. *Earle*, 10 Exch. 1.

(*p*) 3 Inst. 76.

(*q*) Shep. Touch. 88; Co. Litt. 42, a.; Com. Dig. "*Parols*" (A. 7).

(*r*) *Wood* v. *Rowcliffe*, 6 Exch. 407.

See, also, with reference to a release, the authority cited, *ante*, p. 600, n. (*h*).

Where the words in the operative part of a deed of conveyance are of doubtful meaning, the recitals and other parts of the deed may be used as a test to discover the intention of the parties, and to fix the true meaning of those words: Judgm., *Welsh* v. *Trevanion*, 15 Q. B. 751. See, also, *Young* v. *Raincock*, 7 C. B. 310.

As to the mode of construing a deed containing restrictive covenants, see, *per* Dallas, C.J., *Nind* v. *Marshall*, 1 B. & B. 348, 349; cited arg., *Crossfield* v. *Morrison*, 7 C. B. 302.

(*s*) 3 Inst. 76.

violating the fundamental rule, which requires that effect should be given to such intention of the parties as they have used fit words to express (*t*). Thus, in a settlement, the preamble usually recites what it is which the grantor intends to do, and this, like the preamble to an Act of Parliament, is the key to what comes afterwards. It is very common, moreover, to put in a sweeping clause, the use and object of which are to guard against any accidental omission; but in such cases it is meant to refer to estates or things of the same nature and description with those which have been already mentioned, and such general words are not allowed to extend further than was clearly intended by the parties (*u*).

Deed recital controlling words of conveyance.

In construing a deed of grant clear words of conveyance cannot be controlled by words of recital. But if the words of conveyance are general and not specific, they may be controlled by a specific recital; thus, where the lord of the manor of E., which was situated in the parish of K. in the county of M., being also entitled to certain other real estate in K., not parcel of the manor, mortgaged this real estate, not including the manor, to A., and afterwards by a deed reciting that he was seised of or entitled to the messuages, lands, hereditaments, and premises thereinafter intended to be conveyed, subject to the mortgage to A., he conveyed to B., by way of mortgage, all the property comprised in the mortgage to A., and all other the lands, tenements, and hereditaments in the county of M., whereof or whereto the mortgagor is seised or entitled for any estate of inheritance. It was

(*t*) *Per* Maule, J., *Borradaile* v. *Hunter*, 5 Scott, N. R., 431, 432. See, in illustration of these remarks, *Moseley* v. *Motteux*, 10 M. & W. 583.

(*u*) *Per* Lord Mansfield, C.J., *Moore* v. *Magrath*, 1 Cowp. 12; Shep. Touch., by Atherley, 79, n.

held that the manor of K. was not included in the mortgage to B. (*x*).

Rule applicable to wills.

So, in construing a will, a court of justice is not by conjecture to take out of the effect of general words property which those words are always considered as comprehending; the best rule of construction being that which takes the words to comprehend a subject which falls within their usual sense, unless there is something like declaration plain to the contrary (*y*). Thus, it is a certain rule, that reversions are held to be included in the general words of a devise, unless a manifest intention to the contrary appears on the face of the will (*z*).

Again, it is a well-known rule that a devise of an indefinite estate by will prior to the 1st of January, 1838, without words of limitation, is *primâ facie* a devise for life only; but this rule will give way to a different intention, if such can be collected from the instrument, and the estate may be accordingly enlarged (*a*). So, words which would *primâ facie* give an estate tail may be cut down to a life estate, if it plainly appear that they were used as words of purchase only, or if the other provisions of the will show a general intent inconsistent with the particular gift (*b*).

With what qualification.

The doctrine, however, that the general intent must

(*x*) *Rooke* v. *Lord Kensington*, 2 K. & J. 753: see further *Jenner* v. *Jenner*, L. R. 1 Eq. 361.

(*y*) *Per* Lord Eldon, C., *Church* v. *Mundy*, 15 Ves. 396; adopted *per* Tindal, C.J., *Doe* d. *Howell* v. *Thomas*, 1 Scott, N. R. 371.

(*z*) 1 Scott, N. R. 371.

(*a*) *Doe* d. *Sams* v. *Garlick*, 14 M. & W. 698; *Doe* d. *Atkinson* v. *Fawcett*, 3 C. B. 274; *Lewis* v. *Puxley*, 16 M. & W. 733. See stat. 1 Vict. c. 26, s. 28.

In *Hogan* v. *Jackson*, 1 Cowp. 299; S. C., affirmed 3 Bro. P. C., 2nd ed., 388, the effect of general words in a will was much considered.

(*b*) *Fetherston* v. *Fetherston*, 3 Cl. & Fin. 75, 76.

overrule the particular intent, observes Lord *Denman*, C. J., has, when applied to the construction of wills, been much and justly objected to of late, as being, as a general proposition, incorrect and vague, and likely to lead in its application to erroneous results. In its origin it was merely descriptive of the operation of the rule in *Shelley's case* (*c*); and it has since been laid down in other cases where technical words of limitation have been used, and other words, showing the intention of the testator that the objects of his bounty should take in a different way from that which the law allows, have been rejected; but in the later cases the more correct mode of stating the rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense (*d*). The doctrine of general and particular intent, thus explained, should be applied to all wills (*e*), in conjunction with the rule already considered, *viz.*, that every part of that which the testator meant by the words he has used should be carried into effect as far as the law will permit, but no further; and that no part should be rejected, except what the law makes it necessary to reject (*f*).

Statute—a rule to be observed in construing.

Lastly, it is said to be a good rule of construction, that, "where an Act of Parliament begins with words which

(*c*) See *Doe* d. *Cannon* v. *Rucastle*, 8 C. B. 876.

(*d*) See Judgm., *Toller* v. *Wright*, 15 Q. B. 954, and cases there cited.

(*e*) Judgm., *Doe* d. *Gallini* v. *Gallini*, 5 P. & Ad. 621, 640; *Jesson* v. *Wright*, 2 Bligh, 57; *Roddy* v. *Fitzgerald*, 6 H. L. Cas. 823; *Jordan* v. *Adams*, 9 C. B. N. S. 483; *Jenkins* v. *Hughes*, 8 H. L. Cas. 571.

(*f*) Judgm., 5 B. & Ad. 641.

describe things or persons of an inferior degree and concludes with general words, the general words shall not be extended to any thing or person of a higher degree" (*g*), that is to say, "where a particular class [of persons or things] is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class" (*h*), the effect of general words when they follow particular words being thus restricted (*i*).

EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS. (*Co. Litt.* 210. *a.*).—*The express mention of one thing implies the exclusion of another.*

Rule stated and illustrated.

The above rule, or, as it is otherwise worded, *expressum facit cessare tacitum* (*k*), enunciates one of the first principles applicable to the construction of written instruments (*l*); for instance, it seems plainly to exclude any increase of an estate by implication, where there is an estate expressly limited by will (*m*). So an implied cove-

(*g*) *Archb. of Canterbury's case*, 2 Rep. 46, a., cited, Arg. *Casher* v. *Holmes*, 2 B. & Ad. 594; and in *Governors of Bedford Infirmary* v. *Commissioners of Bedford*, 7 Exch. 772.

(*h*) *Per* Pollock, C.B., *Lyndon* v. *Stanbridge*, 2 H. & N. 51; *per* Lord Campbell, C.J., *Reg.* v. *Edmundson*, 2 E. & E. 83; *Gibbs* v. *Lawrence*, 30 L. J., Chanc. 170.

"Where a general enactment is followed by a special enactment on the same subject, the later enactment overrides and controls the earlier one;" *per* Erle, C.J., 14 C. B. N. S. 433.

The rule stated in the text applies also to deeds and agreements. See, for instance, *Agar* v. *Athenæum Life Ass. Soc.*, 3 C. B. N. S. 725.

(*i*) See *Reg.* v. *Cleworth*, 4 B. & S. 927, 934.

(*k*) Co. Litt. 210, a. 183, b.

(*l*) See *per* Lord Denman, C.J., 5 Bing. N. C. 185.

(*m*) *Per* Crompton, J., *Roddy* v. *Fitzgerald*, 6 H. L. Cas. 856.

nant is to be controlled within the limits of an express covenant (*n*). Where a lease contains an express covenant on the part of the tenant to repair, there can be no implied contract to repair arising from the relation of landlord and tenant (*o*). So, although the word "demise" in a lease implies a covenant for title and a covenant for quiet enjoyment, yet both branches of such implied covenant are restrained by an express covenant for quiet enjoyment (*p*). And, where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by implications; the presumption is, that having expressed *some*, they have expressed *all* the conditions by which they intend to be

(*n*) *Nokes' case*, 4 Rep. 80; S. C., Cro. Eliz. 674; *Merrill* v. *Frame*, 4 Taunt. 329; *Gainsford* v. *Griffith*, 1 Saund. R. 58; Vaugh. R. 126; *Deering* v. *Farrington*, 1 Ld. Raym. 14, 19; *Mathew* v. *Blackmore*, 1 H. & N. 762. See *Bower* v. *Hodges*, 13 C. B. 765; *Rashleigh* v. *South Eastern R. C.*, 10 C. B. 612.

(*o*) *Standen* v. *Chrismas*, 10 Q. B. 135, 141; as to which see *per* Bramwell, B., *Churchward* v. *Ford*, 2 H. & N. 446; *et vide Gott* v. *Gandy*, 2 E. & B. 847.

"The authorities cited in the text-books establish these rules, that where there is a *general* covenant to repair and keep and leave in repair, the inference is that the lessee undertakes to repair newly erected buildings. On the other hand, where the covenant is to repair, and keep and leave in repair the *demised buildings*, no such liability arises:" *per* Channell, B., *Cornish* v. *Cleiff*, 3 H. & C. 452–3.

(*p*) *Line* v. *Stephenson*, 5 Bing., N. C. 183; *Merrill* v. *Frame*, 4 Taunt. 329; *per* Lord St. Leonards, *Monypenny* v. *Monypenny*, 9 H. L. Cas. 139. See *Messent* v. *Reynolds*, 3 C. B. 194. By stat. 8 & 9 Vict. c. 106, s. 4, it is enacted, that the word "give" or "grant" in a deed executed after the 1st of October, 1845, shall not imply any covenant in law in respect of any hereditament, except by force of some Act of Parliament. A covenant for quiet enjoyment, however, is also implied by the word "demise" in a lease for years; and this implication is not taken away by either of the recent stats. (7 & 8 Vict. c. 76, and 8 & 9 Vict. c. 106).

As to the obligation of a lessor to show a title to the demised premises, see the Vendor and Purchaser's Act, 1874, s. 2, rule 1.

bound under that instrument (*q*). And it is an ordinary rule that "if authority is given expressly, though by affirmative words, upon a defined condition, the expression of that condition excludes the doing of the act authorized, under other circumstances than those so defined: *expressio unius est exclusio alterius*" (*r*). In a case of the *Queen* v. *Eastern Archipelago Company* (*s*), a company had been incorporated under Royal charter, which contained a proviso that it should be lawful for the Queen, by any writing under the Great Seal or sign manual, to revoke the charter, under circumstancces which subsequently happened. The charter was not revoked in the manner mentioned in the proviso, but proceedings were taken under a *scire facias* to repeal it. It was objected that the only mode of getting rid of the charter was the one given by the proviso. The Judges were equally divided in opinion, and consequently a rule to arrest judgment, on the ground that the declaration did not show that the Queen had, by writing under the Great Seal or sign manual, revoked the charter, was lost. The following observations of *Coleridge*, J., in delivering judgment, seem pertinent to the subject under consideration: "Whatever (says that learned Judge) might be the condition of grantees under other charters, in this charter the law and mode of revocation was specially laid down in this sentence (*i.e.*, the proviso). These grantees were to understand they held this charter subject to this power

(*q*) Judgm., *Aspdin* v. *Austin*, 5 Q. B. 683, 684; *Dunn* v. *Sayles*, *Id.* 685; *Emmens* v. *Elderton*, 4 H. L. Cas. 624; *M'Guire* v. *Scully*, Beatt. 370.

As to *Aspdin* v. *Austin*, *supra*, see *per* Crompton, J., *Worthington* v. *Ludlow*, 2 B. & S. 516.

(*r*) *Per* Willes, J., *North Stafford Steel, &c., Co.* v. *Ward*, L. R. 3 Ex. 177.

(*s*) 1 Ell. & Bl. 310.

of revocation and this only. Commonly speaking, *expressum facit cessare tacitum*, and this would seem a case in which the wholesome maxim eminently applies" (*t*).

Great caution is necessary in dealing with the maxim *expressio unius est exclusio alterius* (*u*), for, as Lord *Campbell*, C., observed, in *Saunders* v. *Evans* (*x*), it is not of universal application, but depends upon the intention of the party as discoverable upon the face of the instrument or of the transaction; thus, where *general words* are used in a written instrument, it is necessary, in the first instance, to determine whether those general words are intended to include other matters besides such as are specifically mentioned, or to be referable exclusively to them, in which latter case only can the above maxim be properly applied (*y*). Where, moreover, an expression, which is *primâ facie* a word of qualification, is introduced, the true sense and meaning of the word can only be ascertained by an examination of the entire instrument, reference being had to those ordinary rules of construction to which we have heretofore adverted (*z*)

Caution requisite in applying rule.

In illustration of the maxim above proposed for consideration, the following cases may be mentioned:—In an action of covenant on a charter-party, whereby the defendant covenanted to pay so much freight for "goods

Examples.

(*t*) P. 342.

(*u*) To show the caution necessary in applying the above rule may be cited *Price* v. *The Great Western R. C.*, 16 M. & W. 244; *Attwood* v. *Small*, 6 Cl. & Fin. 482; and see the remarks, *post*, p. 624.

(*x*) 8 H. L. Cas. 729; *et vide, per* Dr. Lushington, *The Amalia*, 32 L. J., P. M. & A. 194.

(*y*) See *Petch* v. *Tutin*, 15 M. & W. 110.

(*z*) In *Doe* d. *Lloyd* v. *Ingleby*, 15 M. & W. 465, 472, the maxim was applied, by Parke, B., *diss.*, to a proviso for re-entry in a lease, and this case will serve to illustrate the above remark.

delivered at A.," it was held, that freight could not be recovered *pro rata itineris*, the ship having been wrecked at B. before her arrival at A., although the defendant accepted his goods at B.; for, the action being on the original agreement, the defendant had a right to say in answer to it, *non hæc in fœdera veni* (*a*). In order to recover freight *pro rata itineris*, the owner must, in such a case, proceed on the new agreement implied by law from the merchant's behaviour (*b*). And where a mortgage deed contained a covenant on the part of the mortgagor that he would out of the monies to come to him from certain lands and personal estate pay to the mortgagee the principal sum and interest thereon secured by the mortgage deed, it was held that an action by the mortgagee against the mortgagor for money lent would not lie, on the ground that the parties had expressly stated the mode of payment, and therefore the implied promise to pay on demand as for money lent was excluded (*c*).

Again, on a mortgage of dwelling-houses, foundries, and other premises, "together with all grates, boilers, bells, and other fixtures in and about the said two dwelling-houses and the brewhouses thereunto belonging;" it was held, that, although, without these words, the fixtures in the foundries would have passed, yet, by them, the fixtures intended to pass were confined to those in the dwelling-houses and brewhouses (*d*). So, where in an

(*a*) *Cook* v. *Jennings*, 7 T. R. 381. See *Vlierboom* v. *Chapman*, 13 M. & W. 230.

In *Fowkes* v. *Manchester and London Life Ass. Co.*, 3 B. & S. 917, 930, the principal maxim, *supra*, was applied to a policy of insurance. See 8 E. & B. 301.

(*b*) *Per* Lawrence, J., 7 T. R. 385; *Mitchell* v. *Darthez*, 2 Bing., N. C. 555, 571.

(*c*) *Mathew* v. *Blackmore*, 1 H. & N. 762.

(*d*) *Hare* v. *Horton*, 5 B. & Ad.

instrument there are general words first, and an express exception afterwards, the ordinary principle of law has been said to apply — *expressio unius exclusio alterius* (*e*).

Doe d. *Spilsbury* v. *Burdett*.

The case of *Doe* d. *Spilsbury* v. *Burdett* (*f*), furnishes a good illustration of the above maxim. In that case, lands were limited to such uses as S. should appoint by her last will and testament in writing, to be by her signed, sealed, and published, in the presence of and attested by three or more credible witnesses. S. (prior to the stat. 7 Will. 4 & 1 Vict. c. 26 (*g*)) signed and sealed an instrument, containing an appointment, commencing thus: "I, S., do publish and declare this to be my last will and testament;" and concluding, "I declare this only to be my last will and testament; in witness whereof I have to this my last will and testament set my hand and seal, this 12th of December, 1789." And then followed the attestation, thus: "Witness, C. B., E. B., A. B." It was decided by the House of Lords that the power was

715; cited *Mather* v. *Frazer*, 2 K. & J. 536. See *Ringer* v. *Cann*, 3 M. & W. 343; *Cooper* v. *Walker*, 4 B. & C. 36, 49.

(*e*) *Spry* v. *Flood*, 2 Curt. 365.

(*f*) 7 Scott, N. R. 66, 79, 101, 104; S. C., 9 A. & E. 936; 4 A. & E. 1. The decision of the House of Lords in the above case went upon the principle, *expressio unius exclusio alterius* (*per* Sir H. Jenner Fust, *Barnes* v. *Vincent*, 9 Jur. 261; S. C. (reversed in error), 5 Moore, P. C. C. 201), and the opinions delivered in it by the judges will also be found to illustrate the importance of adhering to precedents, and the general principle of construing an instrument *ut res magis valeat quam pereat*. *Doe* d. *Spilsbury* v. *Burdett*, is commented on *per* Wigram, V.-C., *Vincent* v. *Bishop of Sodor and Man*, 8 C. B. 929; and was followed and affirmed in *Newton* v. *Ricketts*, 9 H. L. Cas. 262, 269. See, also, *Johns* v. *Dickinson*, 8 C. B. 934; *Roberts* v. *Phillips*, 4 E. & B. 450, 453.

(*g*) Sect. 9 enacts, that every will shall be in writing, and signed by the testator in the presence of two witnesses at one time; and sect. 10, that appointments by will shall be executed like other wills, and shall be valid, although other required solemnities are not observed.

well executed; and this case was distinguished from several (*h*), in which the attestation clause, in terms, stated the performance of one or more of the required formalities, but was silent as to the others, and in which, consequently, the power was held to have been badly exercised, on the ground, that legal reasoning would necessarily infer the non-performance of such others in the presence of the witnesses, but that a general attestation clause imported an attesting of *all* the requisites.

Wills.

It has been decided that a will expressly subjecting the personal estate to certain charges to which it was before liable does not by force of the maxim raise a necessary implication that it is not to bear other charges not so expressly directed to be paid out of it to which it is primarily liable (*i*).

Simple contracts.

The operation of the principle under consideration is the same, whether the contract be under seal or by parol. For instance, in order to prevent a debt being barred by the Statute of Limitations, a conditional promise to pay "as soon as I can," or "as soon as convenient," is not sufficient, unless proof be given of the defendant's ability to perform the condition; and the reason is, that upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, then

(*h*) See, particularly, *Wright* v. *Wakeford*, 17 Ves. jun. 454; S. C., 4 Taunt. 213; commented on *per* Wigram, V.-C., 8 C. B. 928 *et seq.*; *Doe* d. *Mansfield* v. *Peach*, 2 M. & S. 576; *Doe* d. *Hotchkiss* v. *Pearse*, 2 Marsh. 102; S. C., 6 Taunt. 402. See, *per* Patteson, J., 7 Scott, N. R. 120, 121; *per* Tindal, C. J., *Id.* 126.

(*i*) *Brydges* v. *Phillips*, 6 Ves. 567; Jarman on Wills, 4th ed., vol. ii. 657.

the rule, *expressum facit cessare tacitum*, applies (*k*). In like manner, when the drawer of a bill, when applied to for payment, does not state that he has received no notice of dishonour, but instead of doing so, sets up some other matter in excuse of non-payment, from this conduct the jury may infer an admission that the valid ground of defence does not in fact exist (*l*).

The above cases will sufficiently show the practical application and utility of the maxim or principle of construction, *expressum facit cessare tacitum;* and several of them will likewise serve to illustrate the general rule, which will be considered more in detail hereafter (*m*), *viz.*, that parol evidence is, except in certain cases, wholly inadmissible to show terms upon which a written instrument is silent; or, in other words, that, where there is an express contract between parties, none can be implied (*n*). The Court will not, "by inference, insert in a contract implied provisions with respect to a subject which the contract has expressly provided for. If a man sell a horse and warrant it to be sound, the vendor knowing at the

(*k*) Judgm., *Tanner* v. *Smart*, 6 B. & C. 609; *Edmunds* v. *Downes*, 2 Cr. & M. 459. See *Irving* v. *Veitch*, 3 M. & W. 90.

(*l*) *Campbell* v. *Webster*, 2 C. B. 258, 266.

(*m*) See the maxim, *Nihil tam conveniens est naturali æquitati quam unumquodque dissolvi eodem ligamine quo ligatum est, post*, Chap. IX., and the maxim, *Optimus interpres rerum usus, post*, Chap. X.

(*n*) *Per* Bayley, J., *Grimman* v. *Legge*, 8 B. & C. 326; *Moorsom* v. *Kymer*, 2 M. & S. 316, 320; *Cook* v. *Jennings*, 7 T. R. 383, 385; *per* Lord Kenyon, C. J., *Id.* 137; *Cowley* v. *Dunlop*, *Id.*, 568; *Cutter* v. *Powell*, 6 T. R. 320; S. C., 2 Smith, L. C., 8th ed., 1 (with which compare *Taylor* v. *Laird*, 1 H. & N. 266; *Button* v. *Thompson*, L. R. 4 C. P. 330); *per* Buller, J., *Toussaint* v. *Martinnant*, 2 T. R. 105; *per* Parke, B., *Bradbury* v. *Anderton*, 1 Cr., M. & R. 190; *Mitchell* v. *Darthez*, 2 Bing., N. C. 555; *Lawrence* v. *Sydebotham*, 6 East, 45, 52; *per* Blackburn, J., *Fowkes* v. *Manchester and London Life Ass. Co.*, 3 B. & S. 930.

time that the purchaser wants it for the purpose of carrying a lady, and the horse though sound proves to be unfit for that particular purpose, this would be no breach of the warranty. So, with respect to any other kind of warranty: the maxim *expressum facit cessare tacitum* applies to such cases. If this were not so, it would be necessary for the parties to every agreement to provide in terms that they are to be understood not to be bound by anything which is not expressly set down,—which would be manifestly inconvenient" (*o*).

The following cases may here properly be noticed in further illustration of the maxim before us:—where the rent of a house was specified in a written agreement, to be 26*l.* a year, and the landlord in an action for use and occupation, proposed to show, by parol evidence, that the tenant had also agreed to pay the ground-rent, the Court refused to admit the evidence (*p*).

By an agreement between plaintiff and defendant for the purchase by the former of the manor of S., it was agreed that, on the completion of the purchase, the purchaser should be entitled to the "rents and profits of such parts of the estate as were let" from the 24th day of June, 1843: it was held, that the plaintiff was not, by virtue of this agreement, entitled to recover from the defendant the amount of a fine received by the latter on the admittance of a tenant of certain copyhold premises, part of the said manor, this admittance, after being

(*o*) *Per* Maule, J., *Dickson* v. *Zizinia*, 10 C. B. 610, 911.

(*p*) *Preston* v. *Merceau*, 2 W. Bla. 1249; *Rich* v. *Jackson*, 4 Bro. C. C. 515. See *Sweetland* v. *Smith*, 1 Cr. & M. 585, 596; *Doe* d. *Rogers* v. *Pullen*, 2 Bing. N. C. 749, 753, where the maxim considered in the text is applied by Tindal, C. J., to the case of a tenancy between mortgagor and mortgagee.

postponed from time to time, having taken place on the 1st of July, 1843, and the fine having been paid in the December following; for the condition above mentioned was held applicable to such parts of the estate only as might be "let" in the ordinary sense of that word, and *expressio unius est exclusio alterius;* the lands in question not having been let, it could not be said that the plaintiff was entitled to the sum of money sought to be recovered, the agreement binding the vendor to pay over the *rents* only, and not extending to the casual profits (*q*).

Sale of goods Warranty, &c.

On the same principle, where the conditions of sale of growing timber did not state anything as to *quantity,* parol evidence, that the auctioneer at the time of sale warranted a certain quantity, was held inadmissible (*r*). And here we may observe that, as a general rule, whatever particular *quality* a party warrants, he shall be bound to make good to the letter of the warranty, whether such quality be otherwise material or not; and it is only necessary for the buyer to show that the article sold is not according to the warranty. Where, however, an article is sold by description merely, and the buyer afterwards discovers a *latent* defect, in this case *expressum facit cessare tacitum;* he must, therefore, go further, and show that the description was false within the knowledge of the seller. Thus, where a warranty of a horse was in these terms—"Received of B. 10*l.* for a grey four-year-old colt, warranted sound,"—it was held, that the warranty was confined to soundness; and that, without proving fraud, it was no ground of action, that the colt was only three years old (*s*). So, upon a sale of hops by sample,

(*q*) *Earl of Hardwicke* v. *Lord Sandys*, 12 M. & W. 761.

(*r*) *Powell* v. *Edmunds*, 12 East, 6.

(*s*) *Budd* v. *Fairmaner*, 8 Bing. 48, 52. See *per* Parke, B., *Mondel* v. *Steel*, 8 M. & W. 865; and the

with a warranty that the bulk of the commodity answered the sample, although a fair merchantable price was given, it was held, that the seller was not responsible for a latent defect (which existed both in the sample and the bulk) unknown to him, but arising from the fraud of the grower from whom he purchased (*t*). In this case, the general warranty, implied by law, that the goods were merchantable was excluded by the express warranty of the vendor.

Implied warranty.

This distinction must, however, be taken, that, where the warranty is one which the law implies (*u*), it is clearly admissible in evidence, notwithstanding there is a written contract, if such contract be entirely silent on the subject. For instance, the defendant sold to the plaintiff a barge, and there was a contract in writing between the parties; but it was held, that a warranty was *implied* by law that the barge was *reasonably fit* for use, and that evidence was admissible to show that, in consequence of the defective construction of the barge, certain cement, which the plaintiff was conveying therein, was damaged, and that the plaintiff incurred expense, in rendering her fit for the purpose of his trade—a purpose to which the defendant knew, at the time of the contract, that she was intended to be applied (*x*). And where defendant undertook to supply the plaintiffs with troop stores, "guaranteed to pass survey of the East India Company's officers," this

cases cited under the maxim *Caveat emptor*, *post*, Chap. IX.

(*t*) *Parkinson* v. *Lee*, 2 East, 314, recognised, 8 Bing. 52. See, also, *Laing* v. *Fidgeon*, 6 Taunt. 108; *Chanter* v. *Hopkins*, 4 M. & W. 399; recognised, *Pacific Steam Nav. Co.* v. *Lewis*, 16 M. & W. 783; and in *Prideaux* v. *Bunnett*, 1 C. B. N. S. 613, 617.

(*u*) As to implied warranties and undertakings, see, under the maxim *Caveat emptor*, *post*.

(*x*) *Shepherd* v. *Pybus*, 4 Scott, N. R. 434; *Gardiner* v. *Gray*, 4 Camp. 144.

express guarantee was held not to exclude the warranty implied by law, that the stores should be reasonably fit for the purpose for which they were intended (*y*). And where goods are to be supplied according to sample, the selling by sample excludes the implied warranty that the goods shall be of merchantable quality only with respect to such matters as could be judged of by the sample (*z*).

Sale of specific chattel.

A marked distinction will at once be noticed between cases falling within the class just noticed and those in which it has been held, that, where a warranty or contract of sale has reference to a certain specified chattel, the purchaser will be liable for the price agreed upon, on proof that the particular chattel specified has been duly sent according to the order, and will not be permitted to engraft any additional terms upon the contract. If, for instance, a "two-colour printing-machine," being a known and ascertained article, has been ordered by the defendant, he cannot excuse himself from liability to pay for it, by showing that the article in question does not answer his purpose, because the sole undertaking in this case on the part of the vendor was to supply the particular article ordered, and that undertaking has been performed by him. If, on the other hand, the article ordered by the defendant were not a known ascertained article; as if he had merely ordered, and plaintiff had agreed to supply, a machine for printing two colours, the defendant would not be liable unless the instrument were reasonably fit for the purpose for which it was ordered (*a*). As we shall,

(*y*) *Bigge* v. *Parkinson*, 7 H. & N. 955.

(*z*) *Mody* v. *Gregson*, L. R. 4 Ex. 49; 38 L. J. Ex. 12.

(*a*) *Ollivant* v. *Bayley*, 5 Q. B. 288; *Prideaux* v. *Bunnett*, 1 C. B. N. S. 613; *Parsons* v. *Sexton*, 4 C. B. 899; *Mallan* v. *Radloff*, 17 C.

in the ensuing chapter, have occasion to revert to the subject of implied warranty, we may for the present content ourselves with the single instance just given as sufficiently showing the distinction to which allusion has above been made.

Evidence of custom and usage.

But although the maxim, *Expressio unius est exclusio alterius*, ordinarily operates to exclude evidence offered with the view of annexing incidents to written contracts (*b*) in matters with respect to which they are silent, yet it has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible for this purpose (*c*). The same rule has, moreover, been applied to contracts in other transactions of life, especially to those between landlord and tenant (*d*), in which known usages have been established and prevailed; and this has been done upon the principle of presuming that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages (*e*). Whether such a relaxation of the strictness of the common law was wisely applied where formal

B. N. S. 588; and cases cited, *post*, Chap. IX., under the maxim *Caveat emptor*.

(*b*) See *Cutter* v. *Powell*, 6 T. R. 320; *Pettitt* v. *Mitchell*, 5 Scott, N. R. 721; *Moon* v. *Witney Union*, 3 Bing., N. C. 814, 818; cited and distinguished in *Moffatt* v. *Laurie*, 15 C. B. 583, 592; and in *Scrivener* v. *Pask*, 18 C. B. N. S. 785, 797; *Reg.* v. *Stoke-upon-Trent*, 5 Q. B. 303. It is a general rule, that, upon a mercantile instrument, evidence of usage may be given in explanation of an ambiguous expression: *Bowman* v. *Horsey*, 3 M. & Ry. 85. Generally as to the admissibility of evidence of usage to explain mercantile instruments, see Broom's Com. Law, 5th ed., 498.

(*c*) *Syers* v. *Jonas*, 2 Exch. 111, 117; cited *per* Willes, J., *Azémar* v. *Casella*, L. R. 2 C. P. 439; and cases collected under the maxim *optimus interpres rerum usus*, *post*, Chap. X.

(*d*) *Wigglesworth* v. *Dalison*, 1 Dougl. 201.

(*e*) *Per* Parke, B., *Smith* v. *Wilson* 3 B. & Ad. 728.

instruments have been entered into, and particularly leases under seal, may, it has been observed, well be doubted; but this relaxation has been established by such authority, and the relations of landlord and tenant have been so long regulated upon the supposition that all customary obligations, not altered by the contract, are to remain in force, that it is too late to pursue a contrary course, since it would be productive of much inconvenience if the practice were now to be disturbed (*f*). As an instance of the admissibility of evidence respecting any special custom, may be mentioned the ordinary case in which an agreement to farm according to the custom of the country is held to apply to a tenancy where the contract to hold as tenant is in writing, but is altogether silent as to the terms or mode of farming (*g*).

Every demise, indeed, between landlord and tenant in respect of matters as to which the parties are silent, may be fairly open to explanation by the general usage and custom of the country, or of the district where the land lies; for all persons, under such circumstances, are supposed to be cognisant of the custom, and to contract with a tacit reference to it (*h*).

Evidence inadmissible to vary contract.

It is, however, a settled rule, that, although in certain cases evidence of custom or usage is admissible to annex incidents to a written contract, it can in no case be given in contravention thereof (*i*); and the principle of varying written contracts by the custom of trade has been in

(*f*) Judgm., *Hutton* v. *Warren*, 1 M. & W. 475, 478; *Wigglesworth* v. *Dalison*; 1 Smith's L. C., 8th ed., 594, is the leading case upon the subject above noticed.

(*g*) Judgm., 4 Scott, N. R. 446.

(*h*) *Per* Story, J., 2 Peters (U.S.), R. 148.

(*i*) *Yeats* v. *Pym*, 6 Taunt. 446; *Clarke* v. *Roystone*, 13 M. & W. 752; *Suse* v. *Pompe*, 8 C. B. N. S. 538. See *Palmer* v. *Blackburn*, 1 Bing. 61.

many cases, of which some few are cited *infra*, distinctly repudiated (*k*).

Application of maxim to construction of statute.

A statute, it has been said (*l*), is to be so construed, if possible, as to give sense and meaning to every part; and the maxim was never more applicable than when applied to the interpretation of a statute, that *expressio unius est exclusio alterius* (*m*). The sages of the law, according to *Plowden*, have ever been guided in the construction of statutes by the intention of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and sound discretion (*n*).

(*k*) *Spartali* v. *Benecke*, 10 C. B. 212, 223; *Dickenson* v. *Jardine*, L. R. 3 C. P. 639; *Johnstone* v. *Usborne*, 11 A. & E. 549, 557; *Trueman* v. *Loder*, *Id.* 589 (as to which case see *Dale* v. *Humfrey*, E. B. & E. 1004; S. C., 7 E. & B. 266, 277; *Brown* v. *Byrne*, 3 E. & B. 703); *Jones* v. *Littledale*, 6 A. & E. 486; *Magee* v. *Atkinson*, 2 M. & W. 440. See *Graves* v. *Legg*, 2 H. & N. 210; S. C., 11 Exch. 642, 9 *Id.* 709; *Pym* v. *Campbell*, 6 E. & B. 370; cited in *Rogers* v. *Hadley*, 2 H. & C. 249; *Stewart* v. *Aberdein*, 4 M. & W. 211. The law applicable to this subject will be stated more at length when we have to consider the mode of dissolving contracts, and the application of evidence to their interpretation.

(*l*) *Per* Cur., 9 Johns. (U.S.) R. 349.

(*m*) See *Gregory* v. *Des Anges*, 3 Bing., N. C. 85, 87; *Atkinson* v. *Fell*, 5 M. & S. 240; *Cates* v. *Knight*, 3 T. R. 442, 444; cited, Arg. *Albon* v. *Pyke*, 5 Scott, N. R. 245; *R.* v. *North Nibley*, 5 T. R. 21; *per* Tindal, C. J., *Newton* v. *Holford* (in error), 6 Q. B. 926; *A.-G.* v. *Sillem*, 10 H. L. Cas. 704. The maxim, *supra*, is applied to a statute in *Reg.* v. *Caledonian R. C.*, 16 C. B. 31, and in *Edinburgh and Glasgow R. C.* v. *Magistrates of Linlithgow*, 3 Macq. Sc. App. Cas. 717, 730. *Watkins* v. *Great Northern R. C.*, 16 Q. B. 961, also proceeded on the above maxim; *per* Lord Campbell, C., *Caledonian R. C.* v. *Colt*, 3 Macq. Sc. App. Cas. 839. See *Lawrence* v. *Great Northern R. C.*, 16 Q. B. 643.

In *Bostock* v. *North Staffordshire R. C.*, 4 E. & B. 832, Lord Campbell says, with reference to certain statutes granting powers to a Navigation and a Railway Company, "In construing instruments so loosely drawn as these local Acts, we can hardly apply such maxims as that, '*the expression of one thing is the exclusion of another*,' or that, '*the exception proves the rule*.'"

(*n*) Plowd. 205 b.

Thus it sometimes happens that in a statute, the language of which may fairly comprehend many different cases, some only are expressly mentioned by way of example merely, and not as excluding others of a similar nature. So, where the words used by the legislature are *general*, and the statute is only declaratory of the common law, it shall extend to other persons and things besides those actually named, and, consequently, in such cases, the ordinary rule of construction cannot properly apply. Sometimes, on the contrary, the expressions used are restrictive, and intended to exclude all things which are not enumerated. Where, for example, certain specific things are taxed, or subjected to any charge, it seems probable that it was intended to exclude everything else even of a similar nature, and *à fortiori*, all things different in *genus* and description from those which are enumerated. Accordingly, where the statute 43 Eliz. c. 2, sec. 1, enacted that every occupier of lands, houses, coal mines, or saleable underwood, should be rated for the relief of the poor, it was decided by the House of Lords, that as coal mines alone were mentioned in the Act as rateable to the poor, iron mines were not (*o*).

There is a class of cases where evidence of custom is admitted, which apparently contradicts the language of the contract, namely, where an agent, who enters into a written contract, expressing himself on the face of it to do so as agent, may be held liable as a principal in the transaction, upon proof of a custom to that effect. In *Hutchinson* v. *Tatham* (*p*), perhaps the strongest

(*o*) *Morgan* v. *Crawshay*, L. R. 5 H. L. 304; *Dennison* v. *Holliday*, 1 H. & N. 631. Iron mines are now rateable to the relief of the poor under 37 & 38 Vic. c. 54.

(*p*) L. R. 8 C. P. 482; 42 L. J.

instance of this rule to be found in the books, the defendant, acting as agent for one Lyons, with due authority to do so, effected a charter-party which was expressed in the body of it to be made between the plaintiff, who was a shipowner, and the defendant, as "agent to merchants;" and the charter-party was signed by the defendant, as "agent to merchants." The Court, admitting that, but for the custom, the defendant would not have been personally liable on the charter-party, held that evidence was admissible of a usage to make him so, if he did not disclose his principal's name within a reasonable time. One of the learned judges thought that evidence of the custom would not have been admissible if it had made the agent liable as a principal in the first instance, but that, as it only made the agent liable as a principal if he failed to disclose the name of his principals within a reasonable time, that was not, on the whole, inconsistent with the contract. This would seem, with respect, a subtle refinement of the maxim, *expressio unius exclusio alterius*, and the writer ventures to suggest that the true ground of the liability of an agent so signing, rests in a breach of warranty or implied undertaking; because where an agent contracts on behalf of an undisclosed principal he impliedly undertakes to disclose the principal's name within a reasonable time, and, if he fails to do so, an action it is submitted will lie against him for the breach of this implied undertaking or warranty, in which damages may be recovered for the loss of the contract. The agent in this manner would be held liable in respect of

C. P. 260; *Humphrey* v. *Dale*, 7 E. & B. 266; E. B. & E. 1004; and see *Imperial Bank* v. *London and St. Katharine's Docks Co.*, 5 Ch. Div. 195.

the contract he had made, as an agent, without the necessity of introducing a custom which, but for the decided cases, appears to contradict the written document.

Lastly, where a general Act of Parliament confers immunities which expressly exempt certain persons from the effect and operation of its provisions, it excludes all exemptions to which the subject might have been before entitled at common law; for the introduction of the exemption is necessarily exclusive of all other independent extrinsic exceptions (*q*).

Further remarks as to maxim.

The following remarks of an eminent legal authority, showing the importance of the maxim considered in the preceding pages, when regarded as a rule of evidence rather than of construction, are submitted as well deserving attention :—

"It is a sound rule of evidence, that you cannot alter or substantially vary the effect of a written contract by parol proof. This excellent rule is intended to guard against fraud and perjuries; and it cannot be too steadily supported by courts of justice. *Expressum facit cessare tacitum—vox emissa volat—litera scripta manet,* are law axioms in support of the rule; and law axioms are nothing more than the conclusions of common sense, which have been formed and approved by the wisdom of ages. This rule prevails equally in a court of equity and a court of law; for, generally speaking, the rules of evidence are the same in both courts. If the words of a contract be intelligible, says Lord Chancellor *Thurlow* (*r*), there is no instance where parol proof has been admitted to give them a different sense. 'Where there is a deed in writing,'

(*q*) Dwarr. Stats., 2nd ed., 605; *R.* v. *Cunningham*, 5 East, 478; 3 T. R. 442.

(*r*) *Shelburne* v. *Inchiquin*, 1 Bro. C. C. 341.

he observes in another place (*s*), 'it will admit of no contract which is not part of the deed.' You can introduce nothing on parol proof that adds to, or deducts from, the writing. If, however, an agreement is by *fraud* or *mistake* made to speak a different language from what was intended, then, in those cases, parol proof is admissible to show the fraud or mistake. These are cases excepted from the general rule" (*t*).

We do not propose to dwell at length upon the maxim, *Expressum facit cessare tacitum;* a cursory glance even at the contents of the preceding pages will show it to be of important and extensive practical application, both in the construction of written instruments and verbal contracts, as also in determining the inferences which may fairly be drawn from expressions used or declarations made with regard to particular circumstances. It is, indeed, a principle of logic and of common sense, and not merely a technical rule of construction, and might, therefore, be illustrated by decided cases, having reference probably to every branch of the legal science. It, moreover, has an important bearing upon the doctrine of our law as to implied undertakings and obligations. If A. covenants or engages by contract to buy an estate of B. at a given price, although that contract may be silent as to any obligation on the part of B. to sell; yet, as A. cannot buy without B. selling, the law will imply a corresponding obligation on the part of B. to sell (*u*). So, if a man engages to work and render services which necessitate great outlay of money, time, and trouble, and he is only to be paid by the measure of the work he has performed, the contract

(*s*) *Lord Irnham* v. *Child*, 1 Bro. C. C. 93.

(*t*) *Per* Kent, C. J., 1 Johns. (U. S.), R. 571, 572.

(*u*) *Pordage* v. *Cole*, 1 Wms. Saund. 319 l.

necessarily presupposes and implies on the part of the person who engages him, an obligation to supply the work. So where there is an engagement to manufacture some article, a corresponding obligation on the other party is implied to take it, for otherwise it would be impossible that the party bestowing his services could claim any remuneration (*x*).

Maxim is sometimes inapplicable.

The maxim above commented on, is, however, it has been said (*y*), "by no means of universal conclusive application. For example: it is a familiar doctrine that though where a statute makes unlawful that which was lawful before, and appoints a specific remedy, that remedy must be pursued, and no other; yet where an offence was antecedently punishable by a common law proceeding, as by indictment, and a statute prescribes a particular remedy in case of disobedience, that such particular remedy is *cumulative*, and proceedings may be had either at common law or under the statute" (*z*).

EXPRESSIO EORUM QUÆ TACITE INSUNT NIHIL OPERATUR. (2 *Inst.* 365.)—*The expression of what is tacitly implied is inoperative.*

Examples of rule.

"The expression of a clause which the law implies works nothing" (*a*). For instance, if land be let to two

(*x*) *Per* Cockburn, C.J., *Churchward* v. *Reg.*, L. R. 1 Q. B. 195.

(*y*) *Per* Williams, J., 2 E. & B. 879.

(*z*) *Reg.* v. *Gregory*, 5 B. & Ad. 555.

(*a*) 4 Rep. 73; 5 Rep. 11; Wing. Max., p. 235; Finch, Law, 24; D. 50. 17. 81. In Hobart, R., 170, it is said that this rule "is to be understood having respect to itself only, and not having relation to other clauses." The rule *supra* is applied in *Wroughton* v. *Turtle*, 11 M. &

persons for the term of their lives, this creates a joint tenancy; and if the words "and the survivor of them" are added, they will be mere surplusage, because, by law, the term would go to the survivor (*b*). So, upon a lease reserving rent payable quarterly, with a proviso that, if the rent were in arrear twenty-one days next after the day of payment being lawfully demanded, the lessor might re-enter, it was held, that five years' rent being in arrear, and no sufficient distress on the premises, the lessor might re-enter without a demand, and the above maxim was held to apply; for, previous to the stat. 4 Geo. 2, c. 28, a demand was necessary as a consequence of law, whether the lease contained the words "lawfully demanded" or not. Then the statute says, that "in all cases where half a year's rent shall be in arrear, and the landlord has a right of entry," the remedy shall apply, provided there be no sufficient distress; that is, the statute has dispensed with the demand which was required at the common law, whether expressly provided for by the stipulation of the parties or not (*c*).

Again, every interest which is limited to commence and is capable of commencing on the regular determination of the prior particular estate, at whatever time the particular estate may determine, is, in point of law, a vested estate; and the universal criterion for distinguishing a contingent interest from a vested estate is, that a contingent interest

W. 569, 570; and in *Lawrance* v. *Boston*, 7 Exch. 28, 35, in reference to the operation of the Stamp Acts. See, also, *Ogden* v. *Graham*, 1 B. & S. 773.

(*b*) Co. Litt. 191. a., cited, Arg., 4 B. & Ald. 306; 2 Prest. Abst. Tit. 63. See, also, *per* Lord Langdale, M.R., *Seifferth* v. *Badham*, 9 Beav. 374. The maxim *supra* is applied, *per* Martin, B., in *Scott* v. *Avery*, 5 H. L. Cas. 829.

(*c*) *Doe* d. *Scholefield* v. *Alexander*, 2 M. & S. 525; *Doe* d. *Earl of Shrewsbury* v. *Wilson*, 5 B. & Ald. 364, 384.

cannot take effect immediately, even though the former estate were determined, while a vested estate may take effect immediately, whenever the particular estate shall determine. Hence it often happens, that a limitation expressed in words of contingency is in law treated as a vested estate, according to the rule, *Expressio eorum quæ tacite insunt nihil operatur.* If, for instance, a limitation be made to the use of A. for life, and if A. shall die in the lifetime of B., to the use of B. for life, this limitation gives to B. a *vested* estate, because the words expressive of a contingency are necessarily implied by the law as being in a limitation to A. for life and then to B.; and without those words a vested interest would clearly be given (*d*).

In accordance with the same principle, where a person makes a tender, he always means that the amount tendered, though less than the plaintiff's demand, is all that he is entitled to in respect of it. Where, therefore, the person making the tender said to plaintiff, "I am come with the amount of your bill," upon which plaintiff refused the money, saying, "I shall not take that, it is not my bill," and nothing more passed, the tender was held sufficient; and in answer to the argument, that a tender made in such terms would give to its acceptance the effect of an admission, and was consequently bad, it was observed, that the plaintiff could not preclude himself from recovering more by accepting an offer of part, accompanied by expressions which are implied in every tender (*e*).

The above instances, taken in connection with the remarks appended to the maxim, *Expressio unius est*

(*d*) See, *per* Willes, C.J., 3 Atk. 138; 1 Prest. Abst. Tit. 108, 109.

(*e*) *Henwood* v. *Oliver*, 1 Q. B. 409, 411; recognised in *Bowen* v. *Owen*, 11 Q. B. 130, 155.

exclusio alterius, will serve to show that an expression, which merely embodies that which would in its absence have been by law implied, is altogether inoperative; such an expression, when occurring in a written instrument, is denominated by Lord *Bacon, clausula inutilis;* and, according to him, *clausula vel dispositio inutilis per præsumptionem vel causam remotam ex post facto non fulcitur;* a rule which he thus explains,—*clausula vel dispositio inutilis* is "when the act or the words do work or express no more than the law by intendment would have supplied;" and such a clause or disposition is not supported by any subsequent matter "which may induce an operation of those idle words or acts" (*f*).

Clausula inutilis.

VERBA RELATA HOC MAXIME OPERANTUR PER REFERENTIAM UT IN EIS INESSE VIDENTUR. (*Co. Litt.* 159. *a.*) —*Words to which reference is made in an instrument have the same effect and operation as if they were inserted in the clause referring to them* (*g*).

It is important to bear in mind, when reading any particular portion of a deed or written instrument, that regard must be paid not only to the language of the clause in question, but to that also of any other clause or covenant which may by reference be incorporated with it; and, since the application of this rule, so simple in

(*f*) Bac. Max., reg. 21.

(*g*) The rule is that, "by referring in a document signed by the party to another document, the person so signing in effect signs a document containing the terms of the one referred to:" *per* Crompton, J., *Fitzmaurice* v. *Bayley*, 9 H. L. Cas. 99, where the question arose on the 4th section of the Statute of Frauds.

its terms, is occasionally attended with difficulty (*h*), it has been thought desirable in this place briefly to examine it (*i*).

Examples. Reference to schedule, inventory, or plan.

Where, by articles under seal, the defendant bound himself under a penalty to deliver to the plaintiff by a certain day "the whole of his mechanical pieces as per schedule annexed;" the schedule was held to form part of the deed, for the deed without it would be insensible and inoperative (*k*). And if a contract of sale refer to an inventory, the entire contents thereof will become incorporated with the contract (*l*).

In like manner, if a contract, or an Act of Parliament, refer to a plan, such plan will form a part of the contract or Act, for the purpose for which the reference is made (*m*). And a deed of conveyance, made under the authority of an Act of Parliament, and in the form prescribed thereby, must be read as if the sections of the Act applicable to the subject-matter of the grant and its incidents were inserted in it (*n*).

In a modern case, a deed recited a contract for the sale

(*h*) See *Reg.* v. *Registrar of Middlesex*, 15 Q. B. 976; *Fishmongers' Co. v. Dimsdale*, 12 C. B. 557; *Betts* v. *Walker*, 14 Q. B. 363; *Stewart* v. *Anglo-Californian Gold-Mining Co.*, 18 Q. B. 736.

(*i*) *Boydell* v. *Drummond*, 11 East, 141, 153, 156, 157 (distinguished in *Crane* v. *Powell*, L. R. 4 C. P. 123, 129), and *Wilkinson* v. *Evans*, L. R. 1 C. P. 407, may be consulted in connection with the above maxim. See, also, *Ridgway* v. *Wharton*, 6 H. L. Cas. 238; cited Judgm., *Barker* v. *Allan*, 5 H. & N. 72; *Sillem* v. *Thornton*, 3 E. & B. 868, 880.

(*k*) *Weeks* v. *Maillardet*, 14 East, 568, 574; cited and distinguished, *Dyer* v. *Green*, 1 Exch. 71; and in *Daines* v. *Heath*, 3 C. B. 938, 945.

(*l*) *Taylor* v. *Bullen*, 5 Exch. 779. See *Wood* v. *Rowcliffe*, 6 Exch. 407.

(*m*) *North British R. C.* v. *Tod*, 12 Cl. & Fin. 722, 731; *Reg.* v. *Regent's Canal Co.*, 28 L. J. Chanc. 153. See *Galway* v. *Baker*, 5 Cl. & Fin. 157; *Brain* v. *Harris*, 10 Exch. 908; *Reg.* v. *Caledonian R. C.*, 16 Q. B. 197.

(*n*) *Eliot* v. *North Eastern R. C.*, 10 H. L. Cas. 333, 353.

of certain lands, by a description corresponding with that subsequently contained in the deed, and then proceeded to convey them, with a reference for that description to three schedules. The portion of the particular schedule relating to the piece of land in question stated, in one column, the number which this piece was marked on a certain plan, and, in another column, under the heading "description of premises," it was stated to be "a small piece, marked on the plan;" and by applying the maxim, *Verba illata inesse videntur*, the Court of Exchequer considered, on the above state of facts, that it was the same thing as if the map or plan referred to in the schedule had been actually inserted in the deed, since it was, by operation of the above principle, incorporated with it (*o*).

Memorandum. Statute of Frauds.

If A. writes to B. that he will give £1000 for B.'s estate, and at the same time states the terms in detail, and B. simply writes back in return, "I accept your offer," it may be shown, by parol evidence of the circumstances under which B.'s letter was written, that the word, offer, refers to A.'s letter, and thereupon the two letters may be read as though incorporated the one with the other, so as to constitute a sufficient memorandum of the contract signed by B. to satisfy the Statute of Frauds (*p*).

Affidavit.

Where a question arose respecting the sufficiency of an affidavit, *Heath*, J., observed, "The Court generally requires, and it is a proper rule, that the affidavit shall

(*o*) *Llewellyn* v. *Earl of Jersey*, 11 M. & W. 183, 188; *Lyle* v. *Richards*, L. R. 1 H. L. 222; *Barton* v. *Dawes*, 10 C. B. 261, 263, 266. See, also, as to the admissibility of parol evidence to identify a plan referred to in an agreement for a lease, *Hodges* v. *Horsfall*, 1 Russ. & My 116.

(*p*) *Long* v. *Millar*, 4 C. P. D. 450; 48 L. J. Q. B. 596; *Cave* v. *Hastings*, 7 Q. B. D. 125; 50 L. J. Q. B. 575.

be intituled in the cause, that it may be sufficiently certain in what cause it is to admit of an indictment for perjury; but this affidavit refers to the annexed plea, and the annexed plea is in the cause, and *Verba relata inesse videntur;* therefore it amounts to the same thing as if the affidavit were intituled; and the plaintiff could prosecute for perjury on this affidavit" (*q*).

Indictment.

So, with reference to an indictment, it has been observed, that "there are many authorities to show that one count thereof may refer to another, and that under such circumstances the maxim applies, *Verba relata inesse videntur*" (*r*).

Will.

The above rule is also applied to the interpretation of wills (*s*), although the Courts will not construe a will with the same critical precision which would be prescribed to a grammarian; for instance, where the words, "the said estates," occurring in a will, seemed in strictness to refer to certain freehold land, messuages, and tenements, before devised, on which construction the devisee would only have taken an estate for life, according to the strict rule which existed prior to the stat. 1 Vict. c. 26; yet it was observed by Lord *Ellenborough*, that, in cases of this sort, unless the testator uses expressions of absolute restriction, it may in general be taken for granted that he intends to dispose of the whole interest; and, in furtherance of this intention, Courts of justice have laid hold of the word "estate" as passing a fee, wherever it is not so

(*q*) *Per* Heath, J., *Prince* v. *Nicholson*, 5 Taunt. 337. See, in connection with the maxim above noticed, *Duke of Brunswick* v. *Slowman*, 8 C. B. 617.

(*r*) Judgm., *Reg.* v. *Waverton*, 17 Q. B. 570.

(*s*) See *Doe* d. *Earl of Cholmondeley* v. *Maxey*, 12 East, 589; *Wheatley* v. *Thomas*, Sir T. Raym. 54.

The maxim may apply where a power of appointment by will is exercised. See, for instance, *Re Barker*, 7 H. & N. 109

connected with mere local description as to be cut down to a more restrained signification (*t*).

Another important application of the maxim before us occurs where reference is made in a will to an extrinsic document, in order to elucidate or explain the testator's intention, in which case such document will be received as part of the will, from the fact of its adoption thereby, provided it be clearly identified as the instrument to which the will points (*u*). But parol evidence is inadmissible to show an intention to connect two instruments together, where there is no reference to a foreign instrument, or where the description of it is insufficient (*x*). A further illustration, moreover, of the general principle presents itself, where a question arises as to whether the execution of a will is intended to apply to the several papers in which the will is contained, or is confined to that with which it is more immediately associated, and whether an attested codicil communicates the efficacy of its attestation to an unattested will or prior codicil, so as to render effectual any devise or bequest which may be contained in such prior unattested instrument (*y*).

Exceptions and provisos.

Without adducing further instances of the application

(*t*) *Roe* d. *Allport v. Bacon*, 4 M. & S. 366, 368. See stat. 1 Vict. c. 26, ss. 26, 28. In *Doe* d. *Woodall* v. *Woodall*, 3 C. B. 349, the question was as to the meaning of the words "in manner aforesaid" occurring in a will. And see the cases on this subject, cited 1 Jarman on Wills, 4th ed., 746 (*q*).

(*u*) *Molineux* v. *Molineux*, Cro. Jac. 144; *Dickinson* v. *Stidolph*, 11 C. B. N. S. 341; 1 Jarman on Wills, 4th ed., 89. As to incorporating in the probate of wills of personalty papers referred to thereby, but not *per se* testamentary, see *Sheldon* v. *Sheldon*, 1 Robert. 81; *Allen* v. *Maddock*, 11 Moo. P. C. C. 427.

(*x*) See *Clayton* v. *Lord Nugent*, 13 M. & W. 200.

(*y*) 1 Jarman on Wills, 4th ed., 114; *Allen* v. *Maddock*, 11 Moo. P. C. C. 427; *In the goods of Gill*, L. R. 2 P. & D. 6.

of the maxim, *Verba illata inesse videntur*—it will be proper to notice a difficulty which sometimes arises where an *exception* (*z*), or *proviso* (*a*) either occurs in, or is by reference imported into a general clause in a written instrument; the difficulty (*b*) being in determining whether the party who relies upon the general clause should aver that the particular case does not fall within the exceptive provision, or whether it should be left to the party who relies upon that provision to avail himself of it.

Now the rule usually laid down upon this subject is, that where matter is introduced by way of *exception* into a general clause, the plaintiff must show that the particular case does not fall within such exception, whereas a *proviso* need not be noticed by the plaintiff, but must be pleaded by the opposite party (*c*). "The difference is, where an exception is incorporated in the body of the clause, he who pleads the clause ought also to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is

(*z*) Logically speaking an *exception* ought to be of that which would otherwise be included in the category from which it is excepted, but there are a great many examples to the contrary: *per* Lord Campbell, *Gurly* v. *Gurly*, 6 Cl. & Fin. 764.

(*a*) The office of a *proviso* in an Act of Parliament is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it as extending to cases not intended by the legislature to be brought within its purview: *per* Story, J., delivering judgment, 15 Peters (U. S.), R. 445.

(*b*) An analogous difficulty may also arise with reference to the repeal or modification of a prior by a subsequent statute (see *Bowyer* v. *Cook*, 4 C. B. 236); and with reference to the restriction of general by special words, see *Howell* v. *Richards*, 11 East, 633.

(*c*) *Spieres* v. *Parker*, 1 T. R. 141; *R.* v. *Jukes*, 8 T. R. 542; *per* Lord Mansfield, C.J., *R.* v. *Jarvis*, cited 1 East, 646, note; *Stevens* v. *Stevens*, 5 Exch. 306.

against him, he shall plead the clause, and leave it to the adversary to show the proviso" (*d*).

Hence, if an Act of Parliament or a private instrument contain in it, first, a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something which would otherwise be included in it, a party relying upon the general clause in pleading may set out that clause only, without noticing the separate and distinct clause which operates as an exception. If, on the other hand, the exception itself be incorporated in the general clause, then the party relying upon the general clause must, in pleading, state it with the exception, and if he state it as containing an absolute unconditional stipulation, without noticing the exception, it will be a variance (*e*).

In accordance with the first of the above rules, where one section of a penal statute creates an offence, and a subsequent section specifies certain exceptions thereto, the exceptions need not be negatived by the party prosecuting (*f*). So, where the exception is created by a distinct subsequent Act of Parliament, as well as where it occurs in a subsequent section of the same Act, the above remark applies (*g*); and this rule has likewise been held applicable where an exception was introduced by way of proviso in a subsequent part of a section of a

(*d*) *Per* Treby, C.J., 1 Lord Raym. 120; cited 7 T. R. 31; *Russell* v. *Ledsam*, 14 M. & W. 574. See *Crow* v. *Falk*, 8 Q. B. 467.

(*e*) *Varasour* v. *Ormrod*, 6 B. & C. 430; cited, Arg., *Tucker* v. *Webster*, 10 M. & W. 373; *per* Lord Abinger, C.B., *Grand Junction R. C.* v. *White*, 8 M. & W. 221; *Thibault* v. *Gibson*, 12 M. & W. 94; cited *per* Lord Denman, C.J., *Palk* v. *Force*, 12 Q. B. 672. See *Roe* v. *Bacon*, 4 M. & S. 366, 368; *Paddock* v. *Forrester*, 3 Scott, N. R. 715; 1 Wms. Saunds. 262 b. (1); *R.* v. *Jukes*, 8 T. R. 542.

(*f*) *Van Boven's case*, 9 Q. B. 669. See 15 M. & W. 318.

(*g*) See *per* Lord Abinger, C.B., *Thibault* v. *Gibson*, 12 M. & W. 94.

statute which imposed a penalty, and on a former part of which section the plaintiff suing for the penalty relied (*h*). "There is," remarked *Alderson*, B., in the case referred to, a manifest distinction between a proviso and an exception. Therefore, if an exception occurs in the description of the offence in the statute, the burden of proof rests with the complainant to show that the accused does not come within it (*i*); but, if the exception comes by way of proviso, and does not alter the offence, but merely states what persons are to take advantage of it, then the defence must be specially pleaded, or may be given in evidence under the general issue, according to circumstances" (*k*).

The latter of the two rules above mentioned may be thus illustrated:—Where an exception was introduced into the reservation of rent in a demise, not in express terms, but by reference only to some subsequent matter in the instrument, *viz.*, by the words, "except as hereinafter mentioned," and the plaintiff in his declaration stated the reservation without the exception, referring to a subsequent proviso, this was held, according to the above rule, to be a variance (*l*).

(*h*) *Simpson* v. *Ready*, 12 M. & W. 736 (as to which case see, *per* Alderson, B., *Mayor of Salford* v. *Ackers*, 16 M. & W. 92); *per* Parke, B., *Thibault* v. *Gibson*, 12 M. & W. 96.

(*i*) *Davis* v. *Scrace*, L. R. 4 C. P. 172; 38 L. J. (M. C.) 79; *Taylor* v. *Humphries*, 17 C. B. N. S. 539; 34 L. J. (M. C.) 1.

(*k*) *Per* Alderson, B., *Simpson* v. *Ready*, 12 M. & W. 740; S. C., 11 *Id.* 344; *per* Lord Mansfield, C.J., *Spieres* v. *Parker*, 1 T. R. 144, and in *R.* v. *Jarvis*, 1 East, 644 (d); *Bousfield* v. *Wilson*, 16 M. & W. 185. See *Tennant*, app., *Cumberland*, resp., 1 E. & E. 401.

(*l*) *Vavasour* v. *Ormrod*, 6 B. & C. 430.

AD PROXIMUM ANTECEDENS FIAT RELATIO, NISI IMPEDIATUR SENTENTIA. (*Noy. Max., 9th ed. p. 4.*)—*Relative words refer to the next antecedent, unless by such a construction the meaning of the sentence would be impaired.*

Rule admits of relaxation.

Relative words must ordinarily be referred to the next antecedent, where the intent upon the whole deed or instrument does not appear to the contrary (*m*), and where the matter itself does not hinder it (*n*). The "last antecedent" being the last word which can be made an antecedent so as to have a meaning (*o*).

But, although the above general proposition is true in strict grammatical construction, yet there are numerous examples in the best writers to show that the context may often require a deviation from this rule, and that the relative may be connected with nouns which go before the last antecedent, and either take from it or give to it some qualification (*p*).

(*m*) Com. Dig. "*Parols*," (A. 14, 15); Jenk. Cent. 180; Dyer, 46 b; Wing. Max., p. 19. See *Bryant* v. *Wardell*, 2 Exch. 479; *Piatt* v. *Ashley*, 1 Exch. 257; *Electric Telegraph Co.* v. *Brett*, 10 C. B. 838; *Reg.* v. *Brown*, 17 Q. B. 833, with which compare *In re Jones*, 7 Exch. 586; *Eastern Counties R. C.* v. *Marriage*, 9 H. L. Cas. 32; S. C., 2 H. & N. 625; cited *per* Channell, B., *Tetley* v. *Wanless*, L. R. 2 Ex. 29; S. C., *Id.* 275; and in *Latham* v. *Lafone*, *Id.* 123; *Bristol and Exeter R. C.* v. *Garton*, 8 H. L. Cas. 477.

(*n*) Finch, Law, 8.

(*o*) *Per* Tindal, C.J., 1 A. & E. 445. See *Esdaile* v. *Maclean*, 15 M. & W. 277; *Williams* v. *Newton*, 14 M. & W. 747; *Peake* v. *Screech*, 7 Q. B. 603; *Reg.* v. *Inhabs. of St. Margaret, Westminster*, *Id.* 569; *Ledsam* v. *Russell* (in error), 16 M. & W. 663; S. C., 1 H. L. Cas. 687.

(*p*) Judgm., *Staniland* v. *Hopkins*, 9 M. & W. 192; in which case a difficulty arose as to the proper mode of construing a statute. See, also, *A.-G.* v. *Shillibeer*, 3 Exch. 71; *Beer*, app., *Santer*, resp., 10 C. B. N. S. 435; *Beckh* v. *Page*, 7 *Id.* 861; *Earl of Kintore* v. *Lord Inverury*, 4 Macq. Sc. App. Cas. 520.

For instance, an order of magistrates was directed to the parish of W., in the county of R., and also to the parish of M., in the county of L., and the words "county of R." were then written in the margin, and the magistrates were, in a subsequent part of the order, described as justices of the peace for the county aforesaid: it was held, that it thereby sufficiently appeared that they were justices for the county of R. (*q*).

Wills.

The above rule of grammar is, of course, applicable to wills as well as to other written instruments; for instance:—A testator devised the whole of his *property* situated in P., and also his farm called S., to his adopted child M. He left to his nephew, W., all his other lands, situated in H. and M.; and the will contained this subsequent clause; "And should M. have lawful issue, *the said property* to be equally divided between her lawful issue." It was held, that these words, "the said property," did not comprise the lands in H. and M. devised to the nephew, although it was argued that they must, according to the true grammatical construction of the will, either comprise *all* the property before spoken of, or must refer to the next antecedent (*r*).

(*q*) *R.* v. *St. Mary's, Leicester*, 1 B. & Ald. 327; *Reg.* v. *Inhabs. of Casterton*, 6 Q. B. 507; *Baring* v. *Christie*, 5 East, 398; *R.* v. *Chilvercoton*, 8 T. R. 178.

(*r*) *Peppercorn* v. *Peacock*, 3 Scott, N. R. 651; *Hall* v. *Warren*, 9 H. L. Cas. 420. See, also, *Doe* d. *Gore* v. *Langton*, 2 B. & Ad. 680, 691; *Cheyney's case*, 5 Rep. 68; and the cases collected in *R.* v. *Richards*, 1 M. & Rob. 177; *Owen* v. *Smith*, 2 H. Bla. 594; *Galley* v. *Barrington*, 2 Bing. 387; *Doe* d. *Beech* v. *Nall*, 6 Exch. 102; *Peacock* v. *Stockford*, 3 De G., M. & G. 73, 79.

CONTEMPORANEA EXPOSITIO EST OPTIMA ET FORTISSIMA IN LEGE. (2 *Inst.* 11.)—*The best and surest mode of expounding an instrument is by referring to the time when, and circumstances under which, it was made* (*s*).

Ancient grants, &c.

There is no better way of interpreting ancient words, or of construing ancient grants, deeds, and charters, than by usage (*t*); and the uniform course of modern authorities fully establishes the rule, that, however general the words of an ancient grant may be, it is to be construed by evidence of the manner in which the thing granted has always been possessed and used; for so the parties thereto must be supposed to have intended (*u*). Thus, if it be doubtful on the face of an instrument whether a present demise or future letting was meant, the intention of the parties may be elucidated by the conduct they have pursued (*x*); and where the words of the instrument are ambiguous, the Court will call in aid acts done under it as a clue to the intention (*y*). "Contemporaneous usage," observed Lord *Cottenham*, C., in *Drummond* v.

(*s*) The Courts, however, have frequently repudiated the idea of being influenced in their interpretation of a statute by knowledge of what occurred in Parliament during the passing of the bill: see, for instance, *per* Pollock, C.B., 7 Exch. 617; *per* Alderson, B., 5 Exch. 667.

(*t*) *Per* Lord Hardwicke, C., *A.-G.* v. *Parker*, 3 Atk. 576; and 2 Inst. 282; cited 4 T. R. 819; *per* Parke, B., *Clift* v. *Schwabe*, 3 C. B. 469; and in *Jewison* v. *Dyson*, 9 M. & W. 556; *R.* v. *Mashiter*, 6 A. & E. 153; *R.* v. *Davie*, *Id.* 374; *Senhouse* v. *Earle*, Amb. 288; Co. Litt. S. b.; *Lockwood* v. *Wood*, 6 Q. B. 31; *per* Lord Eldon, C., *A.-G.* v. *Forster*, 10 Ves., jun. 338; *Reg.* v. *Dulwich College*, 17 Q. B. 600.

(*u*) *Weld* v. *Hornby*, 7 East, 199; *R.* v. *Osbourne*, 4 East, 327.

(*x*) *Chapman* v. *Black*, 4 Bing., N. C. 187, 195.

(*y*) *Per* Tindal, C.J., *Doe* d. *Pearson* v. *Ries*, 8 Bing. 181.

The Attorney-General (*z*), "is a strong ground for the interpretation of doubtful words or expressions, but time affords no sanction to established breaches of trust."

Statutes.

Upon the same principle, also, depends the great authority which, in construing a statute, is attributed to the construction put upon it by judges who lived at the time when the statute was made, or soon after, as being best able to determine the intention of the legislature, not only by the ordinary rules of construction, but especially from knowing the circumstances to which it had relation (*a*); and where the words of an Act are obscure or doubtful, and where the sense of the legislature cannot, with certainty, be collected by interpreting the language of the statute according to reason and grammatical correctness, considerable stress is laid upon the light in which it was received and held by the contemporary members of the Profession. "Great regard," says Sir *E. Coke*, "ought, in construing a statute, to be paid to the construction which the sages of the law, who lived about the time or soon after it was made, put upon it; because they were best able to judge of the intention of the makers at the time when the law was made" (*b*). And, "it is by no means an inconvenient mode of construing statutes to presume that the legislature was aware

(*z*) 2 H. L. Cas. 861; *et vide, per* Lord Campbell, *Id.* 863.

(*a*) 2 Phill. Evid., 10th ed., 420; *Bank of England* v. *Anderson*, 3 Bing., N. C. 666. See the resolutions in *Heydon's case*, 3 Rep. 7; as to which *vide per* Pollock, C.B., *A.-G.* v. *Sillem*, 2 H. & C. 431; Lord Camden's Judgment in *Entick* v. *Carrington*, 19 How. St. Trials, 1043 *et seq.*; *per* Coleridge, J., *Reg.* v. *Archb. of Canterbury*, 11 Q. B. 595, 596; *per* Crompton, J., *Sharpley* v. *Overseers of Mablethorpe*, 3 E. & B. 917; *per* Byles, J., 6 C. B. N. S. 213.

(*b*) Cited Dwarr. Stats., 2nd ed., 562, 703; 2 Inst. 11, 136, 181; *per* Holt, C.J., Comb. R. 210; *Corporation of Newcastle* v. *A.-G.*, 12 Cl. & Fin. 419.

of the state of the law at the time they passed" (*c*). This presumption may of course be rebutted, and a declaration of law in a statute shown to be erroneous is inoperative (*d*).

Conformably to what has been above said, stress was laid by several of the judges delivering their opinions in the *Fermoy Peerage case* (*e*), upon the usage observed in the creation of Irish Peerages, since the passing of the Act of Union. And in *Salkeld* v. *Johnson* (*f*), the Court of Exchequer, referring to the stat. 2 & 3 Will. 4, c. 100, intituled "An Act for shortening the time required in claims of *modus decimandi*, or exemption from or discharge of tithes," observe, that they propose to construe it "according to the legal rules for the interpretation of statutes, principally by the words of the statute itself, which we are to read in their ordinary sense, and only modify or alter so far as it may be necessary to avoid some manifest absurdity or incongruity, but no further (*g*). It is proper also to consider the state of the law which it proposes or purports to alter, the mischiefs which existed and which it was intended to remedy, and the nature of the remedy provided, and to look at the statutes *in pari materiâ* (*h*), as a means of explaining this statute." These are the proper modes of ascertaining the intention of the legislature.

Usage, however, it has been observed (*i*), can be binding and operative upon parties only as it is the interpreter

(*c*) *Per* Pollock, C.B., *Jones* v. *Brown*, 2 Exch. 332.

(*d*) *Mollwo, &c.*, v. *Court of Wards*, L. R. 4 P. C. 419.

(*e*) 5 H. L. Cas. 747, 785.

(*f*) 2 Exch. 273.

(*g*) *Ante*, pp. 526, *et seq.*

(*h*) See *Ex parte Copeland*, 2 De G., M. & G. 914.

(*i*) *Per* Lord Brougham, *Magistrates of Dunbar* v. *Duchess of Roxburghe*, 3 Cl. & Fin. 354; cited, Arg., 13 M. & W. 411.

of a doubtful law; for, as against a plain statutory law, no usage is of any avail (*k*). Where, indeed, the statute, speaking on some points, is silent as to others, usage may well supply the defect, especially if it is not inconsistent with the statutory directions, where any are given; and, in like manner, where the statute uses a language of doubtful import, the acting under it for a long course of years may well give an interpretation to that obscure meaning, and reduce that uncertainty to a fixed rule; in such a case the maxim hereafter illustrated is applicable, —*Optimus legis interpres consuetudo* (*l*).

Judicial decisions.

Similar in effect to an unbroken usage is a long current of judicial decisions (*m*), and where the authorities are consistent the Court is bound by them even if it does not approve the principles on which they have acted (*n*).

QUI HÆRET IN LITERA HÆRET IN CORTICE. (*Co. Litt.* 283. *b.*)—*He who considers merely the letter of an instrument goes but skin-deep into its meaning.*

The law of England respects the effect and substance

(*k*) Hence, speaking with reference to the above maxim, Pollock, C.B., in *Pockin* v. *Duncombe*, 1 H. & N. 856, 857, observes, "The rule amounts to no more than this, that if the Act be susceptible of the interpretation which has been put upon it by long usage, the Courts will not disturb that construction;" citing *The Fermoy Peerage case*, 5 H. L. Cas. 716; and see the remarks of the same learned judge in *Gwyn* v. *Hardwicke*, 1 H. & N. 53; *per* Lord Campbell, C.J., *Gorham* v. *Bishop of Exeter*, 15 Q. B. 73, 74.

(*l*) *Post*, Chap. X., where the admissibility of usage to explain an instrument is considered, and additional authorities are cited.

(*m*) *Windham* v. *Chetwynd*, 1 Burr. 419.

(*n*) *Newton* v. *Cowie*, 4 Bingh. 234, 241. For some general observations on the construction of statutes, see Wilberforce Statute Law, 143 *et seq.*

of the matter, and not every nicety of form or circumstance (*o*). The reason and spirit of cases make law, and not the letter of particular precedents (*p*). Hence it is, as we have already seen, a general and comprehensive rule connected with the interpretation of deeds and written instruments, that, where the intention is clear, too minute a stress should not be laid on the strict and precise signification of words (*q*). For instance, by the grant of a remainder, a reversion may pass, and *e converso* (*r*); and if a lessee covenants to leave all the timber which was growing on the land when he took it, the covenant will be broken, if, at the end of the term, he cuts it down, but leaves it there; for this would be defeating the intent of the covenant, although a literal performance of it (*s*).

False grammar.

In accordance with this principle, it is a further rule, that *mala grammatica non vitiat chartam* (*t*)—the grammatical construction is not always, in judgment of law, to be followed; and neither false English nor bad Latin will make void a deed when the meaning of the party is apparent (*u*). Thus, the word "and" has, as already intimated, in many cases, been read "or," and *vice versâ*, when this change was rendered necessary by the context (*x*). Where, however, a proviso in a lease

(*o*) Co. Litt. 283; Wing. Max., p. 19. See *per* Coltman, J., 2 Scott, N. R. 300.

(*p*) *Per* Lord Mansfield, C.J., 3 Burr. 1364.

(*q*) *Ante*, p. 523.

(*r*) Hobart, 27.

(*s*) Woolf., L. & T., 12th ed., 592.

(*t*) 9 Rep. 48; 6 Rep. 40; Wing. Max., p. 18; Vin. Abr., "*Grammar*" (A.); Lofft, 441.

"It may as properly be said in Scotch as in English law that *falsa grammatica non vitiat chartam*:" *per* Lord Chelmsford, *Gollan* v. *Gollan*, 4 Macq. Sc. App. Cas. 591.

(*u*) Co. Litt. 223. b.; *Osborn's case*, 10 Rep. 133; 2 Show. 334. See *Reg.* v. *Inhabs. of Wooldale*, 6 Q. B. 565.

(*x*) *Chapman* v. *Dalton*, Plowd. 289; *Harris* v. *Davis*, 1 Coll. 416.

was altogether ungrammatical and insensible, the Court declared that they did not consider themselves bound to find out a meaning for it (*y*).

In interpreting an Act of Parliament, likewise, it is not, in general, a true line of construction to decide according to the strict letter of the Act; but the Courts will rather (subject to the remarks already made upon this matter (*z*)) consider what is its fair meaning (*a*), and will expound it differently from the letter, in order to preserve the intent (*b*). The meaning of particular words, indeed, in statutes, as well as in other instruments, is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained (*c*).

Contracts.

The maxim applies also to the interpretation of contracts so as to place the construer in the same position as the party who made the contract, to view the circumstances as he viewed them, and so judge of the meaning of the words, and of the correct application of the language to the things described (*d*), and extrinsic evidence for these purposes is admissible (*e*).

(*y*) *Doe* d. *Wyndham* v. *Carew*, 2 Q. B. 317; *Berdoe* v. *Spittle*, 1 Exch. 175. See *Moverly* v. *Lee*, 2 Ld. Raym. 1223, 1224.

(*z*) *Ante*, pp. 525, *et seq.*

(*a*) *Per* Lord Kenyon, C.J., 7 T. R. 196; *Fowler* v. *Padget*, *Id.* 509; 11 Rep. 73; Litt., s. 67, with Sir E. Coke's Commentary thereon, cited, 3 Bing., N. C. 525; Co. Litt. 381. b. See *Vincent* v. *Slaymaker*, 12 East, 372; Arg. *Bignold* v. *Springfield*, 7 Cl. & Fin. 109, and cases there cited.

(*b*) 3 Rep. 27. According to the Roman law, *semper in obscuris quod minimum est sequimur*, D. 50. 17. 9, which is a safe maxim for guidance in our own; see *per* Maule, J., *Williams* v. *Crosling*, 3 C. B. 962.

(*c*) Judgm., *R.* v. *Hall*, 1 B. & C. 123; cited 2 C. B. 66.

(*d*) Addison on Contracts, 8th ed., 182, and the cases there cited.

(*e*) *Hudson* v. *Stewart*, *Stewart* v. *Eddowes*, L. R. 9 C. P. 311; 43 L. J. C. P. 204; *Brown* v. *Fletcher*, 35 L. T. 165.

CHAPTER IX.

THE LAW OF CONTRACTS.

A VERY cursory glance at the contents of the preceding pages will show that we have not unfrequently had occasion to refer to the Law of Contracts, in illustration of maxims heretofore submitted to the reader. Many, indeed, of our leading principles of law have necessarily a direct and important bearing upon the law merchant, and must, therefore, be constantly borne in mind when the attention is directed to that subject. The following pages have been devoted to a review of such maxims as are peculiarly, though by no means exclusively, applicable to contracts; and an attempt has been made, by the arrangement adopted, to show, as far as practicable, the connection which exists between them, and the relation in which they stand to each other. The first of these maxims sets forth the general principle, that parties may, by express agreement *inter se*, and subject to certain restrictions, acquire rights or incur liabilities which the law would not otherwise have conceded to, or imposed upon them. The maxims subsequently considered show that a man may renounce a privilege or right which the law has conferred upon him; that one who enjoys the benefit, must likewise bear the inconvenience or loss resulting from his contract; that, where the right or where the delinquency on each side is equal

in degree, the title of the party in actual possession shall prevail. Having thus stated the preliminary rules applicable to the conduct and position of the contracting parties, we have proceeded to examine the nature of the consideration essential to a valid contract—the liabilities attaching respectively to vendor and purchaser—the various modes of payment and receipt of money—and the effect of contracting, or, in general, of doing any act through the intervention of a third party as agent, together with the legal consequences which flow from the subsequent ratification of a prior act. Lastly, we have stated in what manner a contract may be revoked or dissolved, and how a vested right of action may be affected by the Statute of Limitations, or by the negligence or death of the party possessing it. It will be evident, from the above brief outline of the principles set forth in this Chapter, that some of them apply to actions of tort, as well as to those founded in contract; and when such has been the case, the remarks and illustrations appended have not been in any way confined to actions of the latter description. The general object, however, has been to exhibit the most important elementary rules relative to *contracts*, and to show in what manner the law may, through their medium, be applied to regulate and adjust the infinitely varied and complicated transactions of a mercantile community.

MODUS ET CONVENTIO VINCUNT LEGEM. (2 *Rep.* 73.)—*The form of agreement and the convention of parties overrule the law.*

The above may be regarded as the most elementary General principles.

principle of law relative to contracts (*a*), and may be thus stated in a somewhat more comprehensive form: The conditions annexed to a grant or devise, the covenants inserted in a conveyance or lease, and the agreements whether written or verbal, entered into between parties, have, when duly executed and perfected, and subject to certain restrictions, the force of law over those who are parties to such instruments or agreements (*b*). "Parties to contracts," remarks *Erle*, J., in a modern case (*c*), "are to be allowed to regulate their rights and liabilities themselves," and "the Court will only give effect to the intention of the parties as it is expressed by the contract" (*d*).

Where the tenant of a house covenanted in his lease to pay a reasonable share and proportion of the expenses of supporting, repairing, and amending all party-walls, &c., and to pay all taxes, duties, assessments, and impositions, parliamentary and parochial,—"it being the intention of the parties that the landlord should receive the clear yearly rent of 60*l.* in net money, without any de-

(*a*) In illustration of it, see *Walsh* v. *Secretary of State for India*, 10 H. L. Cas. 367; *Savin* v. *Hoylake R. C.*, L. R. 1 Ex. 9.

(*b*) A "contract" is defined to be "*Une convention par laquelle les deux parties, ou seulement l'une des deux, promettent et s'engagent envers l'autre à lui donner quelque chose ou à faire ou à ne pas faire quelque chose:*" Pothier, Oblig., pt. 1, chap. 1, art. 1, s. 1. *Omne jus aut consensus fecit, aut necessitas constituit, aut firmavit consuetudo:* D. 1. 3. 40. "It is the essence of a contract that there should be a concurrence of intention between the parties as to the terms. It is an agreement because they agree upon the terms, upon the subject-matter, the consideration, and the promise," L. R. 4 Ex. 381.

(*c*) *Gott* v. *Gandy*, 23 L. J., Q. B. 1, 3; S. C., 2 E. & B. 847; *per* Erle, J., 4 H. & N. 343.

(*d*) Judgm., *Stadhard* v. *Lee*, 3 B. & S. 372; *per* Bramwell, B., *Rogers* v. *Hadley*, 2 H. & C. 249; and see *Manchester, Sheffield, & Lincolnshire Railway Co.* v. *Brown*, 8 App. Cases, 703; 52 L. J. 132.

duction whatever,"—and during the lease the proprietor of the adjoining house built a party-wall between his own house and the house demised, under the provisions of the stat. 14 Geo. 3, c. 78: it was held, that the tenant, and not the landlord, was bound to pay the moiety of the expense of the party-wall; "for," observed Lord *Kenyon*, "the covenants in the lease render it unnecessary to consider which of the parties would have been liable under the Act of Parliament; *Modus et conventio vincunt legem*" (*e*).

So, in *Rowbotham* v. *Wilson* (*f*), *Martin*, B., observes, "I think the owner of land may grant the surface, subject to the quality or incident that he shall be at liberty to work the mines underneath, and not be responsible for any subsidence of the surface. If the law of itself, under certain circumstances, protects from the consequences of an act, I think a man may contract for such protection in a case where the law of itself would not apply, *Modus et conventio vincunt legem.*"

In an action on the case for not carrying away tithe corn, the plaintiff alleged, that it was "lawfully and in due manner" set out: it was held, that this allegation was satisfied by proof that the tithe was set out according to an agreement between the parties, although the mode thereby agreed to varied from that prescribed by the common law, the tithe having been set out in shocks, and not in sheaves, as the law directs (*g*).

The same comprehensive principle applies, also, to agreements having immediate reference to mercantile

Mercantile transactions.

(*e*) *Barrett* v. *Duke of Bedford*, 8 T. R. 602, 605.

(*f*) 8 E. & B. 150; S. C., 8 H. L. Cas. 348.

(*g*) *Facey* v. *Hurdom*, 3 B. & C. 213. See *Halliwell* v. *Trappes*, 1 Taunt. 55.

transactions: thus, the stipulations contained in articles of partnership may be enforced, and must be acted on as far as they go, their terms being explained, and their deficiencies supplied, by reference to the general principles of law. Although, therefore, a new partner cannot at law be introduced without the consent of every individual member of the firm, yet the executors of a deceased partner will be allowed to occupy his place, if there be an express stipulation to that effect in the agreement of partnership. Again, the lien which a factor has upon the goods of his principal (*h*), arises from a tacit agreement between the parties, which the law implies; but, where there is an express stipulation to the contrary, it puts an end to the general rule of law (*i*). The general lien of a banker, also, is part of the law merchant, and will be upheld by Courts of justice, unless there be some agreement between the banker and the depositor, either express or implied, inconsistent with such right (*k*). So, it has been remarked that, in the ordinary case of a sale of chattels, time is not of the *essence* of the contract, *unless* it be made so by express agreement, and this may be effected with facility by introducing conditional words into the bargain; the sale of a specific chattel on credit, therefore, although that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a

(*h*) See *Dixon* v. *Stansfeld*, 10 C. B. 398.

(*i*) *Per* Lord Kenyon, C.J., *Walker* v. *Birch*, 6 T. R. 262.

As to the general lien of a wharfinger at common law, see *Dresser* v. *Bosanquet*, 4 B. & S. 460, 486.

(*k*) *Brandão* v. *Barnett*, 12 Cl. & Fin. 787; S. C., 3 C. B. 519.

As to the lien of a shipowner on the cargo for freight, see *How* v. *Kirchner*, 11 Moo., P. C. C., 21; *Kirchner* v. *Venus*, 12 *Id.* 361.

lien upon the goods if they remain in his possession till that price be paid (*l*).

Doctrine of equity. Specific performance.

The doctrine relative to specific performance may here simply be mentioned, as showing that Courts of equity fully acknowledge the efficacy of contracts, where *bonâ fide* entered into in accordance with those formalities, if any, required by the statute law. Formerly equity, indeed, from its peculiar jurisdiction, had power for enforcing the fulfilment of contracts which a Court of law did not possess (*m*); and in exercising this power, it acted upon the principle that express stipulations prescribe the law *quoad* the contracting parties. For instance, money was devised to be laid out in land to the use of B. in tail, remainder to the use of C. in fee. B., having no issue, agreed with C. to divide the money; but before the agreement was executed B. died, whereupon C. becoming, as he supposed, entitled to the whole fund, refused to complete the agreement. The Court, however, upon bill filed by B.'s personal representatives, decreed a specific performance (*n*); acting thereby in strict accordance with the above maxim, *Modus et conventio vincunt legem* (*o*).

Without venturing further into the wide field which is here opening upon us, we may add, that it does sometimes happen, notwithstanding an express agreement between parties, that peculiar circumstances present themselves

(*l*) *Martindale* v. *Smith*, 1 Q. B. 395, cited in *Page* v. *Eduljee*, L. R. 1 P. C. 145. In *Spartali* v. *Benecke*, 10 C. B. 216, Wilde, C.J., observes, "If a vendor agrees to sell for a deferred payment, the property passes, and the vendee is entitled to call for a present delivery without payment." See also, *per* Blackburn, J., *Calcutta and Burmah Steam Nav. Co.* v. *De Mattos*, 32 L. J., Q. B. 328.

(*m*) See *Beason* v. *Paull*, 6 E. & B. 273.

(*n*) *Carter* v. *Carter*, Cas. temp. Talb. 271.

(*o*) See, also, *Frank* v. *Frank*, 1 Chanc. Cas. 84.

which afford grounds for the interference of a Court of equity, in order that the contract entered into may be so modified as to meet the justice of the case. For instance, where an attorney, whilst he lay ill, received the sum of 120 guineas by way of premium or apprentice fee with a clerk who was placed with him, and died three weeks afterwards, the Court decreed a return of 100 guineas, although the articles provided that if the attorney should die within the year, £60 only should be returned (*p*). With respect to this case, Lord *Kenyon*, indeed, observed (*r*), that in it the jurisdiction of a Court of equity had been carried "as far as could be;" but the decision seems, from the facts stated in the pleadings (*s*), to be supportable upon a plain ground of equity, viz. that of mutual mistake, misrepresentation, or unconscientious advantage (*t*), and, consequently, not really opposed to the spirit of the maxim, *Modus et conventio vincunt legem.*

Limitation of rule.

The rule under consideration, however, is subject to restriction and limitation, and does not apply where the express provisions of any law are violated by the contract, nor, in general, where the interests of the public, or of third parties, would be injuriously affected by its fulfilment:—*Pacta, quæ contra leges constitutionesque vel contra bonos mores fiunt, nullam vim habere, indubitati juris est* (*u*); and *privatorum conventio juri publico non derogat* (*x*). "If the thing stipulated

(*p*) *Newton* v. *Rowse*, 1 Vern., 3rd ed., 460. See *Re Thompson*, 1 Exch. 864.

(*r*) *Hale* v. *Webb*, 2 Bro. Chan. Rep. 80.

(*s*) See 1 Vern., 3rd ed., 460 (2).

(*t*) 1 Story, Eq. Jurisp., 12th ed., p. 460.

(*u*) C. 2. 3. 6.

(*x*) D. 50. 17. 45. § 1; D. 2. 14. 38; 9 Rep. 141.

for is in itself contrary to law, the paction by which the execution of the illegal act is stipulated must be held as intrinsically null, *pactis privatorum juri publico non derogatur.* Accordingly illegality may be pleaded as a defence to an action on a deed. Thus, where the defendant and the other obligors on a bond had agreed to execute a bond in favour of the plaintiff as security for a sum of money paid by him to another person as a bribe not to prosecute the other obligors for wilful and corrupt perjury, the defendant was permitted to set up the agreement and thereby avoid the payment of the bond on the ground of illegality (*y*). Also all contracts prohibiting parties from bringing an action, and all agreements purporting to oust the Courts of their jurisdiction, are altogether void (*z*). Thus, an agreement between the parties to a contract that all disputes arising out of it shall be referred to arbitration, does not prevent either party bringing an action on the contract, subject to the right of the other party to apply for a reference in the terms of the agreement under the Common Law Procedure Act, 1854 (*a*), unless the agreement to refer amounts to a condition precedent to the right to sue on the contract, in which case an action cannot be maintained until the condition has been complied with (*b*).

Not only is the consent or private agreement of individuals ineffectual in rendering valid any direct contravention of the law, but it will altogether fail to make just, sufficient, or effectual that which is unjust or

(*y*) *Collins* v. *Blantern*, 1 Smith's L. C., 8th ed., and *infra*, p. 687, and the authorities cited in the note thereto.

(*z*) *Horton* v. *Sayer*, 4 H. & N. 643; 29 L. J. Ex. 28.

(*a*) *Elliott* v. *Royal Exchange Ass. Co.*, L. R. 2 Ex. 237.

(*b*) *Scott* v. *Avery*, 5 H. L. Cas. 811; 25 L. J. Ex. 308.

deficient in respect to any matter which the law declares to be indispensable and not circumstantial merely (*c*). Therefore an agreement by a married woman, that she will not avail herself of her coverture as a ground of defence to an action on a personal obligation which she has incurred, would not be valid or effective in support of the plaintiff's claim and by way of answer to a plea of coverture; for a married woman is under a total disability, and her contract is absolutely void, unless where it can be viewed as a contract on behalf of the husband through her agency (*d*); or is within the Married Woman's Property Act, 1882.

So, with reference to a provision in a foreign policy of insurance against all perils of the sea, "*nullis exceptis*," it was observed, that, although there was an express exclusion of any exception by the terms of the policy, yet the reason of the thing engrafts an implied exception even upon words so general as the above; as, for example, in the case of damage occasioned by the fault of the assured; it being a general rule that the insurers shall not be liable when the loss or damage happens by the fraud or fraudulent conduct of the assured, from which rule it is not allowed to derogate by any pact to the contrary; for *nullâ pactione effici potest ut dolus præstetur*—I cannot effectually contract with any one that he shall charge himself with the faults which I shall commit (*e*); a man cannot validly contract that he shall be responsible for fraud. Neither will the law

(*c*) Bell, Dict. and Dig. of Scotch Law, 694.

(*d*) See *Liverpool Adelphi Loan Ass.* v. *Fairhurst*, 9 Exch. 422; *Wright* v. *Leonard*, 11 C. B. N. S. 258; *Cannam* v. *Farmer*, 3 Exch. 698; *Bartlett* v. *Wells*, 1 B. & S. 836.

(*e*) Judgm., 5 M. & S. 466; D. 2. 14. 27. 3.

permit a person who enters into a binding contract, to say, by a subsequent clause, that he will not be liable to be sued for a breach of it (*f*).

Agreement cannot affect the rights of third parties.

It is equally clear that an agreement entered into between two persons cannot, in general, affect the rights of a third party, who is altogether a stranger to it; thus, if it be agreed between A. and B. that B. shall discharge a particular debt due from A. to C., such an agreement can in no way prejudice C.'s right to sue A. for its recovery; *debitorum pactionibus creditorum petitio nec tolli nec minui potest* (*g*); and, according to the rule of the Roman law—*privatis pactionibus non dubium est non lædi jus cæterorum* (*h*).

In the above and similar cases, then, as well as in some others relative to the disposition of property, which have been noticed in the preceding Chapter (*i*), another maxim emphatically applies: *Fortior et potentior est dispositio legis quàm hominis* (*k*)—the law in some cases overrides the will of the individual, and renders ineffective and futile his expressed intention or contract (*l*).

Surrender by operation of law.

For instance, "surrender" is the term applied in law

(*f*) *Per* Martin, B., *Kelsall* v. *Tyler*, 11 Exch. 534.

(*g*) 1 Pothier, Oblig., 108, 109.

(*h*) D. 2. 15. 8, pr.

(*i*) See, also, *per* Lord Kenyon, C.J., *Doe* d. *Mitchinson* v. *Carter*, 8 T. R. 61; S. C., *Id.* 300: Arg., 15 East, 178.

(*k*) Co. Litt. 234. a., cited, 15 East, 178. The maxim *supra* is illustrated *per* Williams, J., *Hybart* v. *Parker*, 4 C. B. N. S. 213–14.

(*l*) For instance, a man cannot, by his own acts or words, render that irrevocable, which, in its own nature and according to established rules of law, is revocable, as in the case of a will. So, "the rule which prohibits the assignment of a right to sue on a covenant, is not one which can be dispensed with by the agreement of the parties, and it applies to covenants expressed to be with assignees, as well as to others," Judgm., 1 Exch. 645. And see Judgm., *Hibblewhite* v. *M'Morine*, 6 M. & W. 216; Broom's Com., 4th ed., 439.

to "an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist;" as in the case of a lessee taking a second lease from the lessor, or a tenant for life accepting a feoffment from the party in remainder, or a lessee accepting a rent-charge from his lessor. In such case the surrender is not the result of *intention;* for, if there was no intention to surrender the particular estate, or even if there was an express intention to keep it unsurrendered, the surrender would be the act of the law, and would prevail in spite of the intention of the parties (*m*): *Fortior et potentior est dispositio legis quàm hominis* (*n*).

Subject to the above, however, and similar exceptions, the general rule of the civil law holds equally in our own: *Pacta conventa quæ neque contra leges neque dolo malo inita sunt omnimodo observanda sunt* (*o*)—compacts which are not illegal, and do not originate in fraud, must in all respects be observed.

(*m*) *Lyon* v. *Reed*, 13 M. & W. 285, 306; commented on, *Nickells* v. *Atherstone*, 10 Q. B. 944. As to a surrender by operation of law, see also, *Davison* v. *Gent*, 1 H. & N. 744; *Doe* d. *Hull* v. *Wood*, 14 M. & W. 682; *Morrison* v. *Chadwick*, 7 C. B. 266; *Tanner* v. *Hartley*, 9 C. B. 634; Judgm., *Doe* d. *Biddulph* v. *Poole*, 11 Q. B. 716; *Phené* v. *Popplewell*, 12 C. B. N. S. 334.

(*n*) Similarly applied in 8 Johns. (U. S.) R. 401; Co. Litt. 338. a. It may possibly happen, too, that the direction of a particular legal tribunal will have to be disregarded by a judge, as opposed to the common law; see *per* Coleridge, J., 15 Q. B. 192. And see other instances, in connection with illegal contracts, *post*. *Et vide per* Lord Truro, C., *Ellcock* v. *Mapp*, 3 H. L. Cas. 507; *per* Parke, B., *Hallett* v. *Dowdall*, 18 Q. B. 87.

(*o*) C. 2. 3. 29.

QUILIBET POTEST RENUNCIARE JURI PRO SE INTRODUCTO. (*Wing. Max.*, p. 483.)—*Any one may, at his pleasure, renounce the benefit of a stipulation or other right introduced entirely in his own favour* (*p*).

General application of the rule.

According to the well-known principle expressed in the above maxim, any person may decline to avail himself of a defence which would be at law a valid and sufficient answer to the plaintiff's demand, as of infancy, or the Statute of Limitations (*q*); and he may, in either of the two latter cases, waive his right to insist upon the specific defence. Formerly an infant, on attaining his majority, could ratify a contract he had made during his minority, so as to be liable upon it (*r*), but since a recent statute no action can be brought to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification (*s*). A man may also not merely relinquish a particular line of defence, but he may also renounce a claim which might

(*p*) Bell, Dict. and Dig. of Scotch Law, 545; 1 Inst. 99 a.; 2 Inst. 183; 10 Rep. 101.

The words *pro se* "have been introduced into the above maxim to show that no man can renounce a right, which the claims of society forbid the renunciation of;" *per* Lord Westbury, C., *Hunt* v. *Hunt*, 31 L. J., Chanc. 175.

(*q*) See *Tanner* v. *Smart*, 6 B. & C. 603; *per* Parke, B., *Hart* v. *Prendergast*, 14 M. & W. 743.

(*r*) See *per* Bayley, J., 2 M. & S. 25; *per* Abbott, C.J., 5 B. & Ald. 686. *Graham* v. *Ingleby*, 1 Exch. 651, 656, shows that a plaintiff may waive the benefit of the stat. 4 Ann. c. 16, s. 11, which requires that a plea in abatement should be verified by affidavit.

(*s*) 37 & 38 Vict. c. 62, s. 2.

have been substantiated, or release a debt which might have been recovered by ordinary legal process; or he may, by his express contract or stipulation, exclude some more extensive right, which the law would otherwise have impliedly conferred. In all these cases, the rule holds, *Omnes licentiam habere his, quæ pro se indulta sunt renunciare* (*t*)—every man may renounce a benefit or waive a privilege which the law has conferred upon him (*u*). For instance, whoever contracts for the purchase of an estate in fee-simple without any exception or stipulation to vary the general right, is entitled to call for a conveyance of the fee, and to have a good title to the legal estate made out. But, upon the principle under consideration, a man may, by express stipulation, or by contract, or even by consent testified by acquiescence or otherwise, bind himself to accept a title merely equitable, or a title subject to some incumbrance; and whatever defect there may be, which is covered by this stipulation, must be disregarded by the conveyancer to whom the abstract of title is submitted, as not affording a valid ground of objection (*x*).

Again, the right to estovers is incident to the estate of every tenant for life or years (though not to the estate of a strict tenant at will), unless he be restrained by special covenant to the contrary, which is usually the case; so

(*t*) C. 1. 3. 51; C. 2. 3. 29; *Invito beneficium non datur*, D. 50. 17. 69.

See, as illustrating the maxim cited in the text, *Markham* v. *Stanford*, 14 C. B. N. S. 376, 383; distinguished in *Morten* v. *Marshall*, 2 H. & C. 305.

(*u*) *Per* Erle, C.J., *Rumsey* v. *North Eastern R. C.*, 14 C. B. N. S. 649; *Caledonian R. C.* v. *Lockhart*, 3 Macq. Sc. App. Cas. 808, 822; *per* Martin, B., 8 E. & B. 151; *per* Pollock, C.B., and Bramwell, B., 2 H. & C. 308, 309. See *Enohin* v. *Wylie*, 10 H. L. Cas. 1, 15.

(*x*) 3 Prest. Abs. Tit. 221.

that here the above maxim, or that relating to *modus et conventio*, may be applied (*y*).

Another familiar instance of the application of the same principle occurs in connection with the law of bills of exchange. The general rule is, that, in order to charge the drawer or indorser of a bill, payment must be demanded of the acceptor in the first instance on the day when the bill becomes due; and, in case of refusal or default, due notice of such demand and refusal or default must be given to the drawer within a reasonable time afterwards; the reason being, that the acceptor of a bill is presumed to have in his hands effects of the drawer for the purpose of discharging the bill; and, therefore, notice to the drawer is requisite, in order that he may withdraw his effects as speedily as possible from the hands of the acceptor. Until these previous steps have been taken, the drawer cannot be resorted to on non-payment of the bill; and the want of notice to a drawer, who has effects in the hands of the acceptor, after dishonour of the bill, is considered as tantamount to payment by him. So, where a bill has been indorsed, and the holder intends to sue any of the indorsers, it is incumbent on him first to demand payment from the acceptor on the day when the bill becomes due, and, in case of refusal, to give due notice thereof within a reasonable time to the indorser; the reason being, that the indorser is in the nature of a surety only, and his undertaking to pay the bill is not an absolute, but a conditional undertaking, that is, in the event of a demand made on the acceptor, (who is primarily liable) at the time when the bill becomes due, and refusal on his part, or neglect to pay (*z*). As, however, the rule requir-

Waiver of notice of dishonour.

(*y*) Co. Litt. 41. b.

(*z*) Where the drawer has in the drawee's hands no effects, or effects insufficient for payment of the draft

ing notice was introduced for the benefit of the party to whom such notice must be given, it may, in accordance with the above maxim, be waived by that party (*a*). But though a party may thus waive the consequences of laches in respect of himself, he cannot do so in respect of antecedent parties; for that would be in violation of another legal principle presently to be mentioned, which limits the application of the maxim now under consideration to those cases in which no injury is inflicted, by the renunciation of a legal right, upon a third party.

Qualification of rule.

It will be seen from some of the preceding instances, that the rule which enables a man to renounce a right which he might otherwise have enforced, must be applied with this qualification, that, in general, a private compact or agreement cannot be permitted to derogate from the rights of third parties (*b*), or, in other words, although a party may renounce a right or benefit *pro se introductum*, he cannot renounce that which has been introduced for the benefit of another party; thus, the rule that a child within the age of nurture cannot be separated from the mother by order of removal, has been established for the benefit and protection of the child, and therefore cannot be dispensed with by the mother's consent (*c*).

Principal and surety.

One case may, however, be mentioned to which the

(*Carew* v. *Duckworth*, L. R. 4 Ex. 313), he is not in general entitled to notice: *Bickerdike* v. *Bollman*, 1 T. R. 405; *Carter* v. *Flower*, 16 M. & W. 743; *Bailey* v. *Porter*, 14 M. & W. 44; *Thomas* v. *Fenton*, 16 L. J., Q. B. 362.

(*a*) See *Steele* v. *Harmer*, 14 M. & W. 831; *Mills* v. *Gibson*, 16 L. J., C. P. 249; *Burgh* v. *Legge*, 5 M. & W. 418; *Allen* v. *Edmundson*, 2 Exch. 719.

(*b*) 7 Rep. 23. See *Brinsdon* v. *Allard*, 2 E. & E. 19; *Slater* v. *Mayor, &c., of Sunderland*, 33 L. J., Q. B. 37.

(*c*) *Reg.* v. *Birmingham*, 5 Q. B. 210. See *Reg.* v. *Combs*, 5 E. & B. 892.

rule applies, without the qualification—that, *viz.*, of a release by one of several joint creditors, which, in the absence of fraud and collusion, will operate as a release of the claims of the other creditors, and may be pleaded accordingly. On the other hand, the debtee's discharge of one joint or joint and several debtor is a discharge of all (*d*); and a release of the principal debtor will discharge the sureties, unless, indeed, there be an express reservation of remedies as against them (*e*).

It is also a well-known principle of law that, where a creditor gives time to the principal debtor (*f*), there being a surety to secure payment of the debt, and does so without consent of or communication with the surety, he discharges the surety from liability, as he thereby places him in *a new situation* (*g*), and exposes him to a risk and contingency to which he would not otherwise be liable (*h*);

(*d*) *Nicholson* v. *Revill*, 4 A. & E. 675, 683, recognising *Cheetham* v. *Ward*, 1 B. & P. 630; and cited in *Kearsley* v. *Cole*, *infra*, and *Thompson* v. *Lack*, 3 C. B. 540; Co. Litt. 232. a.; Judgm., *Price* v. *Barker*, 4 E. & B. 777; *Clayton* v. *Kynaston*, 2 Salk. 573; 2 Roll. Abr. 410, D. 1; 412, G., pl. 4.

(*e*) *Kearsley* v. *Cole*, 16 M. & W. 128; *Thompson* v. *Lack*, 3 C. B. 540; Judgm., *Price* v. *Barker*, 4 E. & B. 779; *Owen* v. *Homan*, 4 H. L. Cas. 997, 1037.

(*f*) "The general rule of law where a person is surety for the debt of another is this—that though the creditor may be entitled, after a certain period, to make a demand and enforce payment of the debt, he is not bound to do so; and provided he does not preclude himself from proceeding against the principal, he may abstain from enforcing any right which he possesses. If the creditor has voluntarily placed himself in such a position that he cannot sue the principal, he thereby discharges the surety. But mere delay on the part of the creditor, unaccompanied by any valid contract with the principal, will not discharge the surety:" *per* Pollock, C.B., *Price* v. *Kirkham*, 3 H. & C. 441.

(*g*) See *Harrison* v. *Seymour*, L. R. 1 C. P. 518; *Union Bank of Manchester* v. *Beech*, 3 H. & C. 672; *Skillett* v. *Fletcher*, L. R. 2 C. P. 469, and cases there cited.

(*h*) *Per* Lord Lyndhurst, *Oakeley* v. *Pasheller*, 4 Cl. & Fin. 233. See further as to the rule above stated, *per* Lord Brougham, *Mactaggart* v. *Watson*, 3 Cl. & Fin. 541; *per* Lord

and this seems to afford a further illustration of the remark already offered, that a renunciation of a right cannot in general (*i*) be made to the injury of a third party.

Where, however, a husband, whose wife was entitled to a fund in court, signed a memorandum after marriage, agreeing to secure half her property on herself, it was held, that it was competent for the wife to waive this agreement, and that any benefit which her children might have taken under it was defeated by her waiver (*k*).

Provision *positivi juris.*

Lastly, it is clear that the maxim, *Quilibet potest renunciare juri pro se introducto*, is inapplicable where an express statutory direction enjoins compliance with the forms which it prescribes; for instance, a testator cannot dispense with the observance of those formalities which are essential to the validity of a testamentary instrument; for the provisions of the Statute of Frauds, or of the modern Wills Act, were introduced with a view to the public benefit, not that of the individual, and, therefore, must be regarded as positive ordinances of the legislature, binding upon all (*l*). Nor can an individual waive a matter in which the public have an interest (*m*), and the

Eldon, C., *Samuell* v. *Howorth*, 3 Mer. 278, adopted *per* Lord Cottenham, C., *Creighton* v. *Rankin*, 7 Cl. & Fin. 346; *Manley* v. *Boycot*, 2 E. & B. 46; *Pooley* v. *Harradine*, 7 E. & B. 431; *Lawrence* v. *Walmsley*, 12 C. B. N. S. 799, 808: see *Bonar* v. *Macdonald*, 3 H. L. Cas. 226; *General Steam Nav. Co.* v. *Rolt*, 6 C. B. N. S. 550; *Way* v. *Hearn*, 11 C. B. N. S. 774; 13 *Id.* 292; *Frazer* v. *Jordan*, 8 E. & B. 303; *Taylor* v. *Burgess*, 5 H. & N. 1; *Bailey* v. *Edwards*, 4 B. & S. 761.

(*i*) See *Langley* v. *Headland*, 19 C. B. N. S. 42.

(*k*) *Fenner* v. *Taylor*, 2 Russ. & My. 190; Macq. H. & W. 85.

(*l*) See *per* Wilson, J., *Haberyham* v. *Vincent*, 2 Ves., jun., 227; cited *Countess of Zicky Ferraris* v. *Marquis of Hertford*, 3 Curt. 493, 498; S. C., affirmed 4 Moore, P. C. C. 339.

(*m*) *Per* Alderson, B., *Graham* v. *Ingleby*, 1 Exch. 657.

maxim seems also inapplicable where a defendant enters into an agreement by which he is to be deprived of that right to protection to which by law he is entitled (*n*).

QUI SENTIT COMMODUM SENTIRE DEBET ET ONUS. (2 *Inst.* 489.)—*He who derives the advantage ought to sustain the burthen.*

Covenant running with the land.

The above rule (*o*) applies as well in the case where an implied covenant runs with the land, as where the present owner or occupier of land is bound by the express covenant of a prior occupant; whenever, indeed, the ancient maxim, *Transit terra cum onere*, holds true (*p*). The burthen of repairs has, we may observe, always been thrown as much as possible, by the spirit of the common law, upon the occupier or tenant, not only in accordance with the principle contained in the above maxim, but also because it would be contrary to all justice, that the expense of accumulated dilapidation should, at the end of the period of tenancy, fall upon the landlord, when a small outlay of money on the part of the tenant in the first instance would have prevented any such expense becoming necessary; to which we may add, that, generally, the tenant alone has the opportunity of observing, from time to time, when repairs become necessary. In one of the leading cases on this subject, the facts were, that a man demised a house by indenture for years, and the lessee,

(*n*) *Lee* v. *Read*, 5 Beav. 381.

(*o*) In exemplification whereof see *Hayward* v. *Duff*, 12 C. B. N. S. 364.

(*p*) Co. Litt. 231. a. See *Moule* v. *Garrett*, L. R. 5 Ex. 13, and cases there cited.

for him and his executors, covenanted with the lessor to repair the house at all times necessary; the lessee afterwards assigned it over to another party, who suffered it to decay; it was adjudged that covenant lay at suit of the lessor against the assignee, although the lessee had not covenanted for him and his assigns; for the covenant to repair, which extends to the support of the thing demised, is *quodammodo* appurtenant to it, and goes with it; and, inasmuch as the lessee had taken upon himself to bear the charges of the reparations, the yearly rent was the less, which was to the benefit of the assignee, and *Qui sentit commodum sentire debet et onus* (*r*).

The following case may also serve to illustrate the same principle. An action was brought by the devisee in fee of the premises against the executor of a devisee for life of the same premises for permissive waste, the devise providing that the tenant for life should keep the premises in repair. The Court pronounced judgment in favour of the plaintiff on the ground that, however doubtful might be the liability of a tenant for life, in respect of permissive waste, upon whom no express duty to repair was imposed by the instrument creating the estate, yet where such a duty was imposed the liability passed with the enjoyment of the thing thus demised (*s*).

Liability *ratione tenuræ.*

A liability to repair a public highway may attach to Corporations and to individuals by reason of the tenure of lands held by such Corporations or individuals; and in former days it was common for testators to leave portions

(*r*) *Dean and Chapter of Windsor's case*, 5 Rep. 25; cited *per* Tindal, C.J., *Tremeere* v. *Morrison*, 1 Bing. N. C. 98; which case is followed in *Sleap* v. *Newman*, 12 C. B. N. S. 116, 124.

(*s*) *Woodhouse* v. *Walker*, 5 Q. B. D. 404; 49 L. J. Q. B. 609; *Arpden* v. *Seddon*, 1 Ex. D. 496; 46 L. J. Ex. 353.

of their estate charged with this liability (*t*); and owners adjoining, abutting, or fronting a new street, may now be called upon to contribute to its repair under the provisions of a statute noticed below (*u*).

So, it has been designated a principle of "universal application" that "where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made, cannot take the benefit of it without bearing its burthen. The contract must be performed in its integrity" (*x*).

Principal and agent.

A further important illustration of the rule occurs, where a party adopts a contract which was entered into without his authority, in which case he must adopt it altogether. He cannot ratify that part which is beneficial to himself, and reject the remainder; he must take the benefit to be derived from the transaction *cum onere* (*y*). Where, therefore, the owner of goods who was undisclosed at the time of the contract for their sale, subsequently interferes and sues upon the contract, justice requires that, if the defendant has credited and acquired a set-off against the agent before the principal interposed, the latter should be bound by the set-off, in the same way that the agent would have been had he been the plaintiff on the record; and that the defendant should be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been in truth the principal (*z*).

(*t*) Glen on Highways, 107 *et seq.*

(*u*) 38 & 39 Vict. c. 55, s. 150; and see cases collected in Chitty's Statutes, 4th ed., vol. v., 658.

(*x*) *Per* Lord Cranworth and Lord Kingsdown, *Bristow* v. *Whitmore*, 6 H. L. Cas. 391, 404, 418 (where there was a difference of opinion as to the application of the principal maxim, see *per* Lord Wensleydale, *Id.* 406); cited in *The Feronia*, L. R. 2 A. & E. 75, 77, 85.

(*y*) *Per* Lord Ellenborough, C.J., 7 East, 166.

(*z*) See text to *Thompson* v. *Davenport*, Smith's L.C. 8th ed. vol. 2, p. 377.

Assignee.

Again, it is a very general and comprehensive rule, to which we have already adverted, and which likewise falls within the scope of the maxim now under consideration, that the assignee of a chose in action takes it subject to all the equities to which it was liable in the hands of the assignor; and the reason and justice of this rule, it has been observed, are obvious, since the holder of property can only alienate or transfer to another that beneficial interest in it which he himself possesses (*a*). If, moreover, a person accepts anything which he knows to be subject to a duty or charge, it is rational to conclude that he means to take such duty or charge upon himself, and the law may very well imply a promise to perform what he has so taken upon himself (*b*).

Analogous rule in equity,

In administering equity the maxim, *Qui sentit commodum sentire debet et onus*, may properly be said to merge in the yet more comprehensive rule—*equality is equity*—upon the consideration of which it is not within the scope of our present plan to enter. The following instances of the application in equity of the maxim more immediately under our notice must suffice. The legatee of a house, held by the testator on lease at a reserved rent, higher than it could be let for after his death, cannot reject the gift of the lease and obtain an annuity under the will, but must take the benefit *cum onere* (*c*). A testator gives a specific bequest to A., and directs that in consideration of the bequest, A. shall pay his debts, and makes A. his residuary legatee and executor, the payment of the debts is, in this case, a condition annexed

(*a*) 1 Johns. (U.S.) R. 552, 553; 11 *Id.* 80; *Brandon* v. *Brandon*, 25 L. J., Chanc. 896.

(*b*) See *Lucas* v. *Nockells*, 1 Cl. & Fin. 457, citing a passage in Abbott, Shipp., 5th ed. 286.

(*c*) *Talbot* v. *Earl of Radnor*, 3 My. & K. 252.

to the specific bequest, and if A. accept the bequest, he is bound to pay the debts, though they should far exceed the amount of the property bequeathed to him (*d*).

and in Scotch law.

We may observe also, that the Scotch doctrine of "approbate and reprobate," is strictly analogous to that of election in our own law, and may, consequently, be properly referred to the maxim now under consideration. The principle on which this doctrine depends is, that a person shall not be allowed at once to benefit by and to repudiate an instrument, but that, if he chooses to take the benefit which it confers, he shall likewise discharge the obligation or bear the *onus* which it imposes. "It is," as was remarked in an important case upon this subject, "equally settled in the law of Scotland as of England, that no person can accept and reject the same instrument. If a testator give his estate to A., and give A.'s estate to B., courts of equity hold it to be against conscience that A. should take the estate bequeathed to him, and at the same time refuse to give effect to the implied condition contained in the will of the testator. The Court will not permit him to take that which cannot be his but by virtue of the disposition of the will, and at the same time to keep what, by the same will, is given or intended to be given to another person. It is contrary to the established principles of equity that he should enjoy the benefit, while he rejects the condition of the gift" (*e*). Where, therefore, an express condition is annexed to a bequest, the legatee cannot accept and reject, approbate and reprobate the will containing it. If, for example, the testator possessing a landed estate of

(*d*) *Messenger* v. *Andrews*, 4 Russ. 478; and see *Armstrong* v. *Burnett*, 20 Beav. 424.

(*e*) *Kerr* v. *Wauchope*, 1 Bligh. 21.

small value, and a large personal estate, bequeaths by his will the personal estate to the heir, who was not otherwise entitled to it, upon condition that he shall give the land to another, the heir must either comply with the condition, or forego the benefit intended for him (*f*). We may add, that the above rule as expressed by the maxim —*Quod approbo non reprobo*—likewise holds where the condition is implied merely, provided there be clear evidence of an intention to make the bequest conditional; and in this case, likewise, the heir will be required to perform the condition, or to renounce the benefit (*g*)—*Qui sentit commodum sentire debet et onus.*

The converse of this maxim holds.

The converse of the above maxim also holds, and is occasionally cited and applied; for instance, inasmuch as the principal is bound by the acts of his authorised agent, so he may take advantage of them (*h*), *Qui sentit onus sentire debet et commodum* (*i*).

In like manner, it has been observed (*k*), that wherever a grant is made for a valuable consideration, which involves public duties and charges, the grant shall be construed so as to make the indemnity co-extensive with the burthen—*Qui sentit onus sentire debet et commodum.*

Grant of ferry, &c.

In the case, for instance, of a ferry, there is a public charge and duty. The owner must keep the ferry in good repair, upon the peril of an indictment. He must keep sufficient accommodation for all travellers, at all reasonable times. He must content himself with a reasonable toll—such is the *jus publicum* (*l*). In return,

(*f*) Shaw, on Obligations, s. 184.
(*g*) *Id.*, s. 187.
(*h*) *Seignior* v. *Wolmer*, Godb. 360; Judgm., *Higgins* v. *Senior*, 8 M. & W. 844.
(*i*) 1 Rep. 99.
(*k*) *Per* Story, J., 11 Peters (U. S.), R. 630, 631.
(*l*) *Paine* v. *Patrick*, 3 Mod. 289, 294.

he will have a cause of action against every intruder who carries on the line of the ferry, whether it is done directly or indirectly, but the area for the monopoly of a ferry depends on the need of the public for a new passage (*m*).

Although, moreover, the maxim *Qui sentit commodum sentire debet et onus*, to which we have above mainly adverted, applies to throw the burthen of partnership debts upon the partnership estate (*n*), which is alone liable to them in the first instance, yet the converse of this maxim holds with regard to the partnership creditor (*o*).

IN ÆQUALI JURE MELIOR EST CONDITIO POSSIDENTIS. (*Plowd.* 296.)—*Where the right is equal, the claim of the party in actual possession shall prevail.*

Melior est conditio possidentis.

The general rule is, that possession constitutes a sufficient title against every person not having a better title. "He that hath possession of lands, though it be by *disseisin*, hath a right against all men but against him that hath right (*p*); for, "till some act be done by the

(*m*) Addison on Torts, 5th ed. 495; and see *Newton* v. *Cubitt*, 12 C. B. N. S. 32; 31 L. J. C. P. 246.

(*n*) "Perhaps the maxim that 'he who partakes the advantage ought to bear the loss' * * is only the consequence not the cause why a man is made liable as a partner:" *per* Blackburn, J., *Bullen* v. *Sharp*, L. R. 1 C. P. 111.

(*o*) The maxim *Qui sentit onus sentire debet et commodum* is applied also in equity. See, for example, *Pitt* v. *Pitt*, 1 T. & R. 180; Francis, Max. 5.

(*p*) Doct. & Stud. 9. "I take it to be a sound and uncontroverted maxim of law, that every plaintiff or demandant in a court of justice must recover upon the strength of his own title, and not because of the weakness of that of his adversary; that is, he shall not recover without showing

rightful owner to divest this possession and assert his title, such actual possession is *primâ facie* evidence of a legal title in the possessor, so that, speaking generally, the burthen of proof of title is thrown upon any one who claims to oust him: this possessory title, moreover, may, by length of time and negligence of him who had the right, by degrees ripen into a perfect and indefeasible title" (*q*).

Ejectment. Hence it is a familiar rule, that, in ejectment, the party controverting my title must recover by his own strength, and not by my weakness (*r*); and that, "when you will recover anything from me, it is not enough for you to destroy my title, but you must prove your own better than mine; for without a better right, *Melior est conditio possidentis*" (*s*).

Trespass *qu. cl. fr.* So mere possession will support trespass *qu. cl. fr.* against any one who cannot show a better title (*t*); therefore he who commits a trespass upon the possession of another, being himself a wrong-doer, has no right to put the other party to proof of his title (*u*). And to the like effect are the rules of the civil law—*Non possessori*

a *right*, although the adverse party may be unable to show any. It is enough for the latter that he is in possession of the thing demanded until the right owner calls for it. This is a maxim of common justice as well as of law:" *per* Parker, C.J., *Goodwin* v. *Hubbard*, 15 Tyng. (U.S.), R. 204.

(*q*) 2 Com. by Broom & Hadley, 368.

(*r*) Hobart, 103, 104; Jenk. Cent. 118; *per* Lee, C.J., *Martin* v. *Strachan*, 5 T. R. 110, n. See *Feret* v. *Hill*, 15 C. B. 207 (cited and explained *per* Maule, J., *Canham* v. *Barry*, *Id.* 611); *Davison* v. *Gent*, 1 H. & N. 744.

(*s*) Vaughan, R., 58, 60; Hobart, 103. See *Asher* v. *Whitlock*, L. R. 1 Q. B. 1.

(*t*) *Every* v. *Smith*, 26 L. J., Ex. 344; *Jones* v. *Chapman*, 2 Exch. 803, and cases there cited.

(*u*) Addison on Torts, 5th ed. 572, citing *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; 35 L. J. Q. B. 17.

incumbit necessitas probandi possessiones ad se pertinere (*x*), and *in pari causâ possessor potior haberi debet* (*y*).

In like manner it is a rule laid down in the Digest, that the condition of the defendant shall be favoured rather than that of the plaintiff, *favorabiliores rei potius quam actores habentur* (*z*), a maxim which admits of very simple illustration in the ordinary practice of our own courts; for, if, on moving in arrest of judgment, it shall appear from the whole record that the plaintiff had no cause of action, the Court will never give judgment for him, for *Melior est conditio defendentis* (*a*).

Which of two innocent parties must suffer.

So, if a loss must fall upon one of two innocent persons, both parties being free from blame, and justice being thus *in equilibrio*, the application of the same principle will turn the scale (*b*).

"We may lay it down," says *Ashhurst*, J. (*c*), "as a broad, general principle, that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."

The application of the principle above stated must, however, be made with great caution; for instance, it frequently happens, that where money has been paid and received, without fault on either side, it may, notwithstanding the above maxim, be recovered back, either as paid under a mistake of fact (*d*), or on the ground of

(*x*) C. 4. 19. 2.

(*y*) D. 50. 17. 128, § 1.

(*z*) D. 50. 17. 125. As to which maxim, *vide* Arg., 8 Wheaton (U. S.), R. 195, 196.

(*a*) See Hobart, 199.

(*b*) *Per* Bayley, J., *East India Co.* v. *Tritton*, 3 B. & C. 289; Arg., 3 Bing. 408. See *Simmons* v. *Taylor*, 2 C. B. N. S. 528; *Holland* v. *Russell*, 32 L. J., Q. B. 297, which illustrates the maxim *supra* with reference to the law of marine insurance.

(*c*) 2 T. R. 70.

(*d*) *Shand* v. *Grant*, 15 C. B. N. S. 324.

a failure of consideration (*e*), or in consequence of the express or implied terms of the contract. Thus, in *Cox* v. *Prentice*, the defendant received from his principal abroad a bar of silver, and took it to the plaintiffs, who melted it, and sent a piece to an assayer to be assayed at defendant's expense. They subsequently purchased the bar, paying for a certain number of ounces of silver, which by the assay it was calculated to contain, and which was afterwards discovered to exceed the true number: it was held, that the plaintiffs, having offered to return the bar of silver, were entitled to recover the difference in value between the supposed and true weight as money had and received to their use, for this was a case of mutual innocence and equal error,—the mistake having been occasioned by the assay-master, who was properly to be considered as the agent for both parties (*f*).

Negligence.

It is seldom the case, however, that the scale of justice *is* exactly *in equilibrio;* it usually happens, that some degree of laches (*g*), negligence, or want of caution, causes it to preponderate in favour of either of the plaintiff or defendant. In illustration of which remark, we may refer to the doctrine which formerly existed with reference to bills of exchange and promissory notes, when received, not fraudulently, but under circumstances indicating negligence in the holder. For instance, the defendants, who were bankers in a small town, gave notes of their own to a stranger, of whom they asked no questions, in exchange for a 500*l.* Bank of England note:—

(*e*) See *Jones* v. *Ryde*, 5 Taunt. 488, 495, *Devaux* v. *Conolly*, 8 C. B. 640.

(*f*) *Cox* v. *Prentice*, 3 M. & S. 344; cited 8 C. B. 658–9. See *Freeman* v. *Jeffries*, L. R. 4 Ex. 189.

(*g*) This test was applied *per* Tindal, C.J., *Keele* v. *Wheeler*, 8 Scott, N. R. 333. And see the maxim, *Caveat emptor*, *post*.

and it was held, that the plaintiffs, from whom the 500*l.* note had been stolen, and who had duly advertised their loss, might recover the note from the defendants; and it was observed, that, even if the loss of the note had *not* been duly advertised, yet, if it had been received under circumstances inducing a belief that the receiver knew that the holder had become possessed of it dishonestly, the true owner would be entitled to recover its value from the receiver, the negligence of the owner being no excuse for the dishonesty of the receiver; but it was further remarked, that cases might occur in which the negligence of the one party would be an excuse for the negligence of the other, and might authorise the receiver to defend himself according to the above maxim (*h*).

The rule, however, upon this subject, as above intimated, has, by several more recent decisions, been materially altered, and now is, that where a party has given consideration for a bill or note, gross negligence alone will not be sufficient to disentitle him to recover upon it; "gross negligence," it has been observed, "may be evidence of *mala fides*, but is not the same thing" (*i*).

And in a recent case (*k*), the law bearing on the subject before us, is thus stated—that "a person who takes a negotiable instrument *bonâ fide* for value has undoubtedly a good title, and is not affected by the want of title of the party from whom he takes it. His having the means of knowing that the security has been lost or stolen, and neglecting to avail himself thereof, may

(*h*) *Snow* v. *Peacock*, 3 Bing. 406; commented on *Foster* v. *Pearson*, 1 C. M. & R. 855.

(*i*) *Goodman* v. *Harvey*, 4 A. & E. 876; *Uther* v. *Rich*, 10 A. & E. 790.

(*k*) *Raphael* v. *Bank of England*, 17 C. B. 161, 171.

amount to negligence; and Lord *Tenterden* at one time thought negligence was an answer to the action. But the doctrine of *Gill* v. *Cubitt* (*l*) is not now approved of." A stolen note could not be said to be taken *bonâ fide* by one who had notice or knowledge of the theft, or who, having a suspicion thereof in his mind, and the means of knowledge in his power, wilfully disregarded them (*m*).

"The object of the law merchant," it has been judicially observed (*n*), as to bills and notes made or become payable to bearer, is to secure their circulation as money; therefore, honest acquisition confers title. To this despotic but necessary principle, the ordinary rules of the common law are made to bend. The misapplication of a genuine signature written across a slip of stamped paper (which transaction being a forgery would, in ordinary cases, convey no title), may give a good title to any sum fraudulently inscribed within the limits of the stamp, * * * Negligence in the maker of an instrument payable to bearer makes no difference in his liability to an honest holder for value; the instrument may be lost by the maker without his negligence, or stolen from him; still he must pay. The negligence of the holder, on the other hand, makes no difference in *his* title. However gross the holder's negligence, if it stop short of fraud, he has a title." Thus, in the case of a bill of exchange or promissory note, "the law respects the nature and uses of the instrument more than its own ordinary rules."

(*l*) 3 B. & C. 466.

(*m*) *Per* Willes, J., 17 C. B. 174, citing *May* v. *Chapman*, 16 M. & W. 355. See, also, in connection with the above subject, *Berry* v. *Alderman*, 13 C. B. 674; *Mather* v. *Lord Maidstone*, 18 C. B. 273, cited *Hall* v. *Featherstone*, 3 H. & N. 288.

(*n*) *Per* Byles, J., 2 H. & C. 134-5, and in *Foster* v. *Mackinnon*, L. R. 4 C. P. 712.

Likewise, in the Court of Chancery, where two persons having an equal equity, have been equally innocent and equally diligent, the rule generally applicable is, *Melior est conditio possidentis* or *defendentis*. Thus, equity constantly refuses to interfere, either for relief or discovery against a *bonâ fide* purchaser of the legal estate for a valuable consideration, and without notice of the adverse title, provided he chooses to avail himself of the defence at the proper time and in the proper mode (*o*). Rule in equity.

Not only *in æquali jure*, but likewise *in pari delicto*, is it true that *Potior est conditio possidentis;* where each party is equally in fault, the law favours him who is actually in possession (*p*),—a well-known rule, which is, in fact, included in that more comprehensive maxim to which the present remarks are appended. *Par delictum.*

"If," said *Buller*, J., "a party come into a court of justice to enforce an illegal contract, two answers may be given to his demand: the one, that he must draw justice from a pure fountain, and the other, that *Potior est conditio possidentis*" (*q*). Agreeably to this rule, where money is paid by one of two parties to such a contract to the other, in a case where both may be considered as *participes criminis*, an action will not lie after the contract is executed to recover the money. If A. agree to give B. money for doing an illegal act, B. cannot, although he do the act, recover the money by

(*o*) See Sugden, V. & P., 14th ed. 741, 742.

(*p*) The rule as to *par delictum* was much considered in *Atkinson* v. *Denby*, 6 H. & N. 778; 7 *Id.* 934.

(*q*) *Munt* v. *Stokes*, 4 T. R. 564; 2 Inst. 391. See *Fitzroy* v. *Gwillim*, 1 T. R. 153; observed upon by Tindal, C.J., 7 Bing. 98; Arg., 10 B. & C. 684; 2 A. & E. 13; *per* Lord Mansfield, C.J., 2 Burr. 926. See, also, *Gordon* v. *Howden*, 12 Cl. & Fin. 241, note, and cases there cited.

an action; yet, if the money be paid, A. cannot recover it back (*r*). So the premium paid on an illegal insurance, to cover a trading with an enemy, cannot be recovered back, though the underwriter cannot be compelled to make good the loss (*s*). In the above and similar cases, the party actually in possession has the advantage,—*Cum par delictum est duorum semper oneratur petitor et melior habetur possessoris causa* (*t*).

Prior to the recent stat. 8 & 9 Vict. c. 109, the maxim as to *par delictum* was frequently applied in determining the right to recover back money deposited with a stakeholder to abide the result of a wager between two parties; and although, by the 18th section of that Act, all wagers are now rendered absolutely void, and money deposited under the circumstances stated cannot after the event has been decided be recovered back (*u*), yet some of the decisions alluded to as well as others not affected by the statute, may properly be cited in support of the proposition, that if an illegal contract be executory, and if the plaintiff dissent from or disavow the contract before its completion, he may, on disaffirmance

(*r*) *Webb* v. *Bishop*, cited 1 Selw., N. P., 10th ed. 92, n. (42); *Browning* v. *Morris*, Cowp. 792; *per* Park, J., *Richardson* v. *Mellish*, 2 Bing. 250.

(*s*) *Vandyck* v. *Hewitt*, 1 East, 96; *Lowry* v. *Bourdieu*, Dougl. 468; *Andree* v. *Fletcher*, 3 T. R. 266; *Lubbock* v. *Potts*, 7 East, 449; *Palyart* v. *Leckie*, 6 M. & S. 290; *Cowie* v. *Barber*, 4 M. & S. 16. See *Edgar* v. *Fowler*, 3 East, 222; *Thistlewood* v. *Cracraft*, 1 M. & S. 500.

(*t*) D. 50. 17. 154.

(*u*) The statute "prohibits the recovery of money which has been won in such a transaction, or has been deposited to abide the event of a wager, but it does not apply to the case where a party seeks to recover his stake upon a repudiation of the wagering contract:" *per* Parke, B., 10 Exch. 738; *Batty* v. *Marriott*, 5 C. B. 818; cited in *Coombes* v. *Dibble*, L. R. 1 Ex. 248, 251, or where the event has not in fact been decided, *Sadler* v. *Smith*, L. R. 5 Q. B. 40.

See stat. 16 & 17 Vict. c. 119, s. 5.

thereof, recover back money whilst *in transitu* to the other contracting party, there being in this case a *locus pœnitentiæ*, and the *delictum* being incomplete (*x*), similarly where goods have been delivered to another for a fraudulent purpose they can be recovered back if that purpose has not been carried out (*y*).

Where, however, money has been actually paid over in pursuance of an illegal contract, it cannot, subject to the remarks hereafter made, be recovered back, for the Court will not assist such a transaction in any way (*z*). So, where property has been placed by one party in the hands of another for illegal purposes, as for smuggling, if the latter refuses to account for the proceeds, and fraudulently or unjustly withholds them, the party aggrieved must abide by his loss, for *In pari delicto melior est conditio possidentis;* which, it has been said, is a maxim of public policy, equally respected in courts of law and courts of equity (*a*).

In a case recently decided (*b*), the facts were as under: —The plaintiff deposited with the defendant the half of a £50 bank note, by way of pledge to secure the payment of money due from the plaintiff to the defendant, such debt having been contracted for wine and suppers supplied to the plaintiff by the defendant, in a brothel kept by her, to be there consumed in a debauch. An action

(*x*) *Martin* v. *Hewson*, 10 Exch. 737; *Varney* v. *Hickman*, 5 C. B. 271; *Hampden* v. *Walsh*, 1 Q. B. D. 189; 45 L. J. Q. B. 238; *Trimble* v. *Hill*, 5 App. Cas. P. C. 342.

(*y*) *Taylor* v. *Bowers*, 1 Q. B. D. 291; 45 L. J. Q. B. 163.

(*z*) *Per* Lord Ellenborough, C.J., *Edgar* v. *Fowler*, 3 East, 225; *Ex parte Bell*, 1 M. & S. 751, cited, Judgm., *M'Callan* v. *Mortimer*, 9 M. & W. 642; *Goodall* v. *Lowndes*, 6 Q. B. 464. See *Keir* v. *Leeman* (in error), 6 Q. B. 308; *per* Gibbs, C.J., 8 Taunt. 497.

(*a*) 1 Story, Eq. Jurisp., 12th ed., p. 52.

(*b*) *Taylor* v. *Chester*, L. R. 4 Q. B. 309; 38 L. J. Q. B. 225.

brought to recover the half note so deposited failed on application of the principal maxim, which, observed the Court, "is as thoroughly settled as any proposition of law can be. It is a maxim of law, established, not for the benefit of plaintiffs or defendants, but is founded on the principles of public policy, which will not assist a plaintiff who has paid over money or handed over property in pursuance of an illegal or immoral contract, to recover it back" (*c*). The same principle was recently applied to the case of a bill of sale given to secure a sum of money advanced by the grantee to the grantor to take up a certain acceptance in the name of the grantee which had been forged by the grantor. The property had been seized by the grantee under his bill, and his title was held good against the trustee in bankruptcy of the grantor, on the ground that even assuming a legal misdemeanour had been committed by the grantee in securing the grantor from discovery and conviction the grantor was a party to it, and the goods having been seized the maxim applied (*d*).

Test applicable as to *par delictum*.

As well from the case of *Taylor* v. *Chester* (*e*), as from prior authorities, it seems that the true test for determining whether or not the objection that plaintiff and defendant were *in pari delicto* can be sustained, is by considering whether the plaintiff can make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party. For instance, A. laid an illegal wager with B., in which C. agreed with A. to take a share; B. lost the wager, and A., in expectation that B. would pay the amount on a certain day,

(*c*) Citing *per* Lord Ellenborough, C.J., *Edgar* v. *Fowler*, 3 East, 225.

(*d*) *Re Mapleback*, 4 Ch. Div. 150; 46 L. J. Bk. 14.

(*e*) See Judgm., L. R. 4 Q. B. 314, *ante*, p. 675.

advanced to C. his share of the winnings. B. died insolvent before the day, and the bet was never paid; it was held, that A. could not recover from C. the sum thus advanced. "The plaintiff," observed *Gibbs*, C. J., "says the payment was on a condition which has failed, but that condition was that B., who was concerned with the plaintiff and defendant in this illegal transaction, should make good his part by paying the whole bet to the plaintiff, and it is impossible to prove the failure of this condition, without going into the illegal contract, in which all the parties were equally concerned. We think, therefore, that the plaintiff's claim is so mixed with the illegal transaction, in which he and the defendant, and B., were jointly engaged, that it cannot be established without going into proof of that transaction, and, therefore, cannot be enforced in a court of law" (*f*). So, in a modern case, it was held, that one of two parties to an agreement to suppress a prosecution for felony, cannot maintain an action against the other for an injury arising out of the transaction in which they had thus been illegally engaged; and this case was decided on the short ground, that the plaintiff could not establish his claim, as stated upon the record, without relying upon the illegal agreement originally entered into between himself and the defendant (*g*).

Rule, how qualified.

Thus far we have considered the effect of *par delictum* as between the immediate parties to the illegal transaction; we must add that the maxim respecting it does not seem to apply where an action is brought by one of such parties for the recovery of money received by a

(*f*) *Simpson* v. *Bloss*, 7 Taunt. 246, 250 (recognised and followed in *Fivaz* v. *Nicholls*, 2 C. B. 501, 513), with which compare *Johnson* v. *Lansley*, 12 C. B. 468.

(*g*) *Fivaz* v. *Nicholls*, *supra*. See, also, *Williams* v. *Bayley*, L. R. 1 H. L. 200.

third party in respect of the illegal contract. Where, for instance, A. received money to the use of B. on an illegal contract between B. and C., it was held, that A. could not set up the illegality of the contract as a defence in an action brought by B. for money had and received (*h*). It seems, however, clear that if A. enter into an illegal agreement with B., and money is received by the latter party in pursuance thereof, inasmuch as A. could not sue for its recovery, so, neither could those who may subsequently have succeeded to A.'s rights maintain an action for the same (*i*).

It is, in the next place, material to observe, that the maxim which we are considering does not apply unless *both* the litigating parties are *in delicto*—it cannot be insisted upon as a defence, either by or against an innocent party (*k*). Where, for instance, there were two plaintiffs in an action for money had and received, and the defendant set up a receipt, which had been fraudulently obtained by him, with the privity of one of the plaintiffs, the Court observed, that the maxim now under consideration was inapplicable; for, one of the plaintiffs not being *in delicto*, the defendant ought not, as against him, to be allowed to set up his own fraud (*l*). Where, also, money was paid by an underwriter to a broker for

(*h*) *Tenant* v. *Elliott*, 1 B. & P. 3; *Farmer* v. *Russell*, *Id.* 296; *Bousfield* v. *Wilson*, 16 M. & W. 185; and see, particularly, *Nicholson* v. *Gooch*, 5 E. & B. 999.

(*i*) See *Belcher* v. *Sambourne*, 6 Q. B. 414; cited, *Ellis* v. *Russell*, 10 Q. B. 952, 956.

(*k*) *Williams* v. *Hedley*, 8 East, 378. An express statutory provision may enable one party to an illegal contract to sue the other, although both parties to it had knowledge of the facts constituting the illegality. See *Lewis* v. *Bright*, 4 E. & B. 917.

(*l*) *Skaife* v. *Jackson*, 3 B. & C. 421; *Farrar* v. *Hutchinson*, 9 A. & E. 641; which cases are cited and explained *per* Parke, B., *Wallace* v. *Kelsall*, 7 M. & W. 273. See *Tregoning* v. *Attenborough*, 7 Bing 97.

the use of the assured on an illegal contract of insurance, it was held, that the assured might recover the money from the broker, on the ground that the broker could not insist on the illegality of the contract as a defence, the obligation on him arising out of the fact that the money was received by him to the use of the plaintiff, which created a promise in law to pay (*m*).

The decision of the Court of Error in *Fisher* v. *Bridges* (*n*) is important with reference to the subject above adverted to. There, to a declaration in covenant for the payment of a certain sum of money, the defendant pleaded that, before the making of the deed declared upon, it was unlawfully agreed between the plaintiff and defendant that the former should sell and the latter purchase of him a conveyance of land for a term of years, in consideration of a sum of money to be paid by the defendant to the plaintiff, "to the intent and in order and for the purpose, as the plaintiff at the time of the making the said agreement well knew," that the land should be sold by lottery, contrary to the form of the statutes in such case made and provided; that afterwards, "in pursuance of the said illegal agreement," the land was assigned for the term, and a part of the purchase-money remaining unpaid, the defendant, to secure the payment thereof, made the deed and covenant in the declaration mentioned. Upon these pleadings, the Court of Queen's Bench held, that the contract in question appeared to have been made after the illegal transaction between the plaintiff and

(*m*) *Tenant* v. *Elliott*, 1 B. & P. 3; *Rosewarne* v. *Billing*, 33 L. J., C. P. 55; *Smith* v. *Linds*, 5 C. B. N. S. 587. See *M'Gregor* v. *Lowe*, Ry. & M. 57.

(*n*) 3 E. & B. 642 (reversing judgment in S. C., 2 E. & B. 118), followed in *Geere* v. *Mare*, 2 H. & C. 339. See *A.-G.* v. *Hollingworth*, 2 H. & N. 416; *O'Connor* v. *Bradshaw*, 5 Exch. 882.

defendant had terminated; that it formed no part of such transaction, and was consequently unaffected by it. The judgment thus given was, however, reversed in error upon reasoning of the following kind, which seems conclusive;—the original agreement was clearly tainted with illegality, inasmuch as all lotteries are prohibited by the stat. 10 & 11 Will. 3, c. 17, s. 1; and by the 12 Geo. 2, c. 28, s. 4, all sales of houses, lands, &c., by lottery are declared to be void to all intents and purposes. The agreement being illegal, then, no action could have been brought to recover the purchase-money of the land which was the subject-matter thereof; and the covenant accordingly, being connected with an illegal agreement, could not be enforced (*o*). And, further, even if the plea above abstracted were not to be understood as alleging that the covenant declared upon was given in pursuance of an illegal agreement, it would, remarked the Court of Exchequer Chamber, still show a good defence to the action, for "the covenant was given for the payment of the purchase-money. It springs from and is the creature of that illegal agreement; and if the law would not enforce the illegal contract, so neither will it allow parties to enforce a security for purchase-money which, by the original bargain, was tainted with illegality."

The decisions come to in *Fisher* v. *Bridges* (*p*), and *Simpson* v. *Bloss*, already cited (*q*), establish conclusively this rule, that when a demand connected with an illegal transaction can be sued on without the necessity of

(*o*) *Paxton* v. *Popham*, 9 East, 408; *The Gas Light Co.* v. *Turner*, 6 Bing. N. C. 324; 5 *Id.* 666.

(*p*) Followed in *Geere* v. *Mare*, 2 H. & C. 339; see *Att.-Gen.* v. *Hollingsworth*, 2 H. & N. 416; *Flight* v. *Reed*, 1 H. & C. 703; 32 L. J. Ex. 265; and Smith's L. C., 8th ed., vol. i. 410–411.

(*q*) *Ante*, p. 677, n. (*f*).

having recourse to the illegal transaction, the plaintiff may maintain an action; but, wherever it is necessary to resort to the illegal transaction to make out a case, the plaintiff will fail to enforce his claim in a court of law (*r*).

But although, in the cases latterly considered, the maxim, *In pari delicto potior est conditio possidentis*, forcibly applies, the doctrine expressed thereby must needs be accepted with qualification. For instance, where an instrument between two parties has been entered into for a purpose which may be considered fraudulent as against some third person, it may yet be binding according to the true construction of its language as between themselves (*s*). Likewise, by statute an instrument may be avoided for certain purposes, and yet remain valid and effectual *quoad alia;* a conveyance fraudulently and collusively made for the mere purpose of conferring a vote, and with an understanding that it should not operate beneficially to the grantee, although it fail by virtue of the stats. 7 & 8 Will. 3, c. 25, s. 7, and 10 Ann. c. 23, s. 1, to give the right of voting, will, nevertheless, as between the parties to it, pass the interest (*t*). In any such case the intention of the legislature, and the mischief to be repressed, must carefully be ascertained; and we should remember, that "the policy of the law always is not to

(*r*) See *per* Watson, B., *A.-G.* v. *Hollingworth*, 2 H. & N. 423.

(*s*) *Shaw* v. *Jeffery*, 13 Moo., P. C. C. 432, 454–5.

(*t*) *Phillpotts* v. *Phillpotts*, 10 C. B. 85; *Doe* d. *Roberts* v. *Roberts*, 2 B. & Ald. 367; *Bessey* v. *Windham*, 6 Q. B. 166. See *Marshall*, app., *Bown*, resp., 7 M. & Gr. 188; *Doe* d. *Williams* v. *Lloyd*, 5 Bing. N. C. 741 (in connection with which see *Philpott* v. *St. George's Hospital*, 6 H. L. Cas. 338); *Callaghan* v. *Callaghan*, 8 Cl. & Fin. 374; *Bowes* v. *Foster*, 2 H. & N. 779; *Doe* d. *Richards* v. *Lewis*, 11 C. B. 1035; *White* v. *Morris*, *Id.* 1015.

make contracts void to a greater extent than the mischief to be remedied renders necessary (*u*).

It is also to be observed, that when a contract is made for the performance of an illegal act, knowledge that the act is illegal, is not material, and the contract is void; but where the contract is capable of being legally performed, it can only be avoided by showing a wicked intention to break the law, and for this purpose knowledge of what the law is becomes material (*x*).

Joint tort-feasors.

Contribution.

To the above maxim respecting *par delictum* may properly be referred the general rule, that an action for contribution cannot be maintained by one of several joint wrong-doers against another, although the one who claims contribution may have been compelled to pay the entire damages recovered as compensation for the tortious act (*y*). It has, however, been laid down, that this rule does not extend to cases of indemnity, where one man employs another to do acts, not unlawful in themselves, for the purpose of asserting a right (*z*); therefore where an act has been done by the plaintiff under the express instructions of the defendant which occasions an injury to the rights of third persons, yet if such act is not apparently illegal in itself, but is done honestly and *bonâ fide* in compliance with the defendant's directions, the latter shall be bound to indemnify the former against

(*u*) *Per* Maule, J., 10 C. B. 99, 100. And see *per* Lord Cranworth, C., *Ex parte Neilson*, 3 De G. M. & G. 516; *Young* v. *Billiter*, 8 H. L. Cas. 682.

(*x*) *Waugh* v. *Morris*, L. R. 8 Q. B. 202; 42 L. J. Q. B. 57.

(*y*) *Merryweather* v. *Nixan*, 8 T. R. 186. See *per* Lord Lyndhurst, C.B., *Colburn* v. *Patmore*, 1 C. M. & R. 83; *Farebrother* v. *Ansley*, 1 Camp. 342; cited *Shackell* v. *Rosier*, 2 Bing., N. C. 647. See, also, *Campbell* v. *Campbell*, 7 Cl. & Fin. 166; *Blackett* v. *Weir*, 5 B. & C. 387.

(*z*) *Per* Lord Kenyon, C.J., 8 T. R. 186; cited, 8 Bing. 72.

the consequences thereof (*a*). Moreover, the rule as to non-contribution between wrong-doers must be further qualified in this manner, that where one party induces another to do an act which is not legally supportable, and yet is not clearly in itself a breach of law, the party so inducing shall be answerable to the other for the consequences (*b*).

Rule in equity.

In equity, as at law, the general rule undoubtedly is, that relief will not be granted where both parties are *in pari delicto*, unless in cases where public policy requires the interference of the Court (*c*). Before proceeding, however, to apply this maxim, it is very necessary to ascertain whether, under the given circumstances, the delinquency attaching to each of the principal parties is really equal in degree. Equity, for instance, has refused to treat as *in pari delicto* the parties to a private agreement, entered into between father and son, which was illegal, as being a fraud upon the Post-office; and in this case Sir *W. Grant*, after observing that the question was, whether the general rule, *In pari delicto melior est conditio possidentis*, should prevail, and the Court should refuse relief,—both parties to the agreement, which was impeached by the bill, having been guilty of a violation of the law,—remarked, that "Courts both of law and equity have held, that two parties may concur in an illegal act without being deemed to be in all respects *in pari delicto;*" and his Honour thought, under the circumstances before him, that the *par delictum*

(*a*) *Toplis* v. *Grave*, 5 Bing. N. C. 650; *Betts* v. *Gibbins*, 2 A. & E. 75; *Dugdale* v. *Lovering*, L. R. 10 C. P. 196; 44 L. J. C. P. 197.

(*b*) *Per* Lord Denman, C.J., *Betts* v. *Gibbins*, 2 A. & E. 75.

(*c*) *Reynell* v. *Sprye*, 1 De G. M. & G. 660; 1 Story, Eq. Jurisp., 12th ed. 288.

between the parties had not been in fact established, the agreement being substantially the mere act of the father (c).

EX DOLO MALO NON ORITUR ACTIO. (*Cowp.* 343).—*A right of action cannot arise out of fraud.*

Connection between this and preceding maxim.

It has been thought convenient to place the above maxim in immediate proximity to that which precedes it, because these two important rules of law are intimately related to each other, and the cases which have already been cited in illustration of the rule as to *par delictum* may be referred to generally as establishing and justifying the position, that an action cannot be maintained which is founded in fraud, or which springs *ex turpi causâ*. The connection which exists between these maxims may, indeed, be satisfactorily shown by reference to a case already cited. In *Fivaz* v. *Nicholls* (d), an action was brought for an alleged conspiracy between B., the defendant, and a third party, C., to obtain payment of a bill of exchange accepted by the plaintiff in consideration that B. would abstain from prosecuting C. for embezzlement (e); and it was held that the action would not lie, inasmuch as it sprung out of an illegal transaction, in which both plaintiff and defendant had been engaged, and of which proof was essential in order to establish the plaintiff's claim as stated upon the record. In this case, therefore, the maxim, *Ex dolo malo*

(c) *Osborne* v. *Williams*, 18 Ves. 379; see Arg., *Clough* v. *Ratcliffe*, 16 L. J., Chanc. 477; S. C., 1 De G. & S. 164; 1 Story, Eq. Jurisp., 12th ed., pp. 291–2.

(d) 2 C. B. 501, 512, 515.

(e) See the cases cited, *post*, p. 687.

non oritur actio, was evidently applicable; and not less so with regard either to the original corrupt agreement or to the subsequent alleged conspiracy, was the general principle of law, *In pari delicto potior est conditio defendentis* (*f*). To the class of cases also which establish that contribution cannot be enforced amongst wrong-doers, and that a person who has committed an act declared by the law to be criminal, will not be permitted to recover compensation from one who has knowingly participated with him in the commission of the crime (*g*), a similar remark seems equally to apply. Bearing in mind, then, this connection between the two kindred maxims aforesaid, we shall in the ensuing pages proceed to consider briefly the important and very comprehensive principle, *Ex dolo malo*, or, more generally, *Ex turpi causâ, non oritur actio* (*h*).

Dolus in the Roman law.

In the first place, then, we may observe, that the word *dolus*, when used in its more comprehensive sense, was understood by the Roman jurists to include "every intentional misrepresentation of the truth made to induce another to perform an act which he would not else have undertaken" (*i*), and a marked distinction accordingly existed in the civil law between *dolus bonus* and *dolus malus*: the former signifying that degree of artifice or dexterity which a person might lawfully employ to advance his own interest, in self-defence against an enemy

(*f*) See, also, *Stevens* v. *Gourley*, 7 C. B. N. S. 99, 108.

(*g*) *Per* Lord Lyndhurst, *Colburn* v. *Patmore*, 1 Cr. M. & R. 83; *per* Maule, J., 2 C. B. 509.

(*h*) The principle embodied in the above maxim is widely applicable; *ex. gr.*, an order under the stat. 20 & 21 Vict., c. 85, s. 21, protecting the after-acquired property of a married woman deserted by her husband is confined to property of which she may become possessed or "which she may acquire by her own *lawful* industry." See *Mason* v. *Mitchell*, 3 H. & C. 528.

(*i*) Mackeld. Civ. Law, 165.

or for some other justifiable purpose (*k*); and the latter including every kind of craft, guile, or machination, intentionally employed for the purpose of deception, cheating, or circumvention (*l*). As to the latter species of *dolus* (with which alone we are now concerned), it was a general and fundamental rule, that *dolo malo pactum se non servaturum* (*m*); and, in our own law, it is a familiar principle, that no valid contract can arise out of a fraud; and that any action brought upon a supposed contract, which is shown to have arisen from fraud, may be successfully resisted (*n*).

Rule in our law.

It is, moreover, a general proposition, that an agreement to do an unlawful act cannot be supported at law, —that no right of action can spring out of an illegal contract (*o*); and this rule, which applies not only where

(*k*) Mackeld. Civ. Law, 165; Bell, Dict. and Dig. of Scotch Law, 319; D. 4. 3. 3; Brisson, *ad verb.* "*Dolus;*" Tayl. Civ. Law, 4th ed. 118.

(*l*) D. 4. 3. 1, § 2; *Id.* 50. 17. 79; *Id.* 2. 14. 7, § 9.

(*m*) D. 2. 14. 7, § 9.

(*n*) *Per* Patteson, J., 1 A. & E. 42; *per* Holroyd, J., 4 B. & Ald. 34; *per* Lord Mansfield, C.J., 4 Burr. 2300; *Evans* v. *Edmonds*, 13 C. B. 777; *Canham* v. *Barry*, 15 C. B. 597; with which compare *Feret* v. *Hill*, *Id.* 207; *Reynell* v. *Sprye*, 1 De G. M. & G. 660; *Curzon* v. *Belworthy*, 3 H. L. Cas. 742. The effect of fraud in nullifying a contract, the right to rescind a contract of sale on the ground of fraud, and the distinction between *legal* and *moral* fraud, are discussed under the maxim, *Caveat emptor*, *post*, p. 723, *et seq.* See *Earl of Bristol* v. *Wilsmore*, 1 B. & C. 514; *Green* v. *Baverstock*, 14 C. B. N. S. 204; *Clarke* v. *Dickson*, E. B. & E. 148; *Horsfall* v. *Thomas*, 1 H. & C. 90.

As to the meaning of the word "fraud," compare, *per* Lord Romilly, *diss.*, *Spackman* v. *Evans*, L. R. 3 H. L. 239; *per* Lord Cairns, *Reese River Silver Mining Co.* v. *Smith*, L. R. 4 H. L. 79–80; *Kennedy* v. *Panama, &c., Mail Co.*, L. R. 2 Q. B. 588; *Lee* v. *Jones*, 17 C. B. N. S. 482.

(*o*) *Per* Lord Abinger, C.B., 4 M. & W. 657; *per* Ashurst, J., 8 T. R. 93. See *Jones* v. *Waite*, 5 Scott, N. R. 951; S. C., 5 Bing., N. C. 341; and 1 Bing., N. C., 656; *Ritchie* v. *Smith*, 6 C. B. 462; *Cundell* v. *Dawson*, 4 C. B. 376; *Sargent* v. *Wedlake*, 11 C. B. 732.

the contract is especially illegal, but whenever it is opposed to public policy, or founded on an immoral consideration (*p*), is expressed by the well-known maxim, *Ex turpi causâ non oritur actio* (*q*), and is in accordance with the doctrine of the civil law, *Pacta quæ turpem causam continent non sunt observanda* (*r*), "wherever the consideration, which is the ground of the promise, or the promise which is the consequence or effect of the consideration, is unlawful, the whole contract is void" (*s*). A court of law will not, then, lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land; and this objection to the validity of a contract must, from authority and reason, be allowed in all cases to prevail. No legal distinction can be supported between the application of this objection to parol contracts and to contracts under seal; it would be inconsistent with reason and principle to hold, that, by the mere ceremony of putting a seal to an instrument, that is, by the voluntary act of the parties themselves, a contract, which was void in itself, as being in violation of the law of the land, should be deemed valid, and an action maintainable thereon in a court of justice (*t*).

In *Collins* v. *Blantern* (*u*), which is a leading case to *Collins v. Blantern.*

(*p*) *Allen* v. *Rescous*, 2 Lev. 174; *Walker* v. *Perkins*, 3 Burr. 1568; *Wetherell* v. *Jones*, 3 B. & Ad. 225, 226; *Egerton* v. *Earl Brownlow*, 4 H. L. Cas. 1.

(*q*) Judgm., *Bank of United States* v. *Owens*, 2 Peters (U. S.), R. 539.

(*r*) D. 2. 14, 27, § 4.

(*s*) 1 Bulstr. 38; Hobart, 72; Dyer, 356.

(*t*) Judgm., 5 Bing, N. C. 675.

(*u*) 2 Wils. 341; *Williams* v. *Bayley*, L. R. 1 H. L. 200. See *Ward* v. *Lloyd*, 7 Scott, N. R. 499; *Ex parte Critchley*, 15 L. J., Q. B. 124; *Keir* v. *Leeman*, 6 Q. B. 308;

show that illegality may well be pleaded as a defence to an action on a bond, the bond was alleged to have been given to the obligee as an indemnity for a note entered into by him for the purpose of inducing the prosecutor of an indictment for perjury to withhold his evidence; for the plaintiff, it was contended that the bond was good and lawful, the condition being singly for the payment of a sum of money, and that no averment should be admitted that the bond was given upon an unlawful consideration not appearing upon the face of it; but it was held, that the bond was void *ab initio*, and that the facts might be specially pleaded; and it was observed by *Wilmot*, C.J., delivering the judgment of the Court, that "the manner of the transaction was to gild over and conceal the truth; and whenever courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish and show the transactions in their true light." And again, "this is a contract to tempt a man to transgress the law, to do that which is injurious to the community: it is void by the common law; and the reason why the common law says such contracts are void is for the public good: *you shall not stipulate for iniquity*. All writers upon our law agree in this—no polluted hand shall touch the pure fountains of justice (*x*).

It is, obviously, to the interest of the public that "the

S. C. (in error), 9 Q. B. 371 (where the compromise of a misdemeanour was held to be illegal); *Masters* v. *Ibberson*, 8 C. B. 100; *Reg.* v. *Hardey*, 14 Q. B. 529; *Reg.* v. *Blakemore*, *Id.* 544; *Reg.* v. *Alleyne*, 4 E. & B. 186.

(*x*) See, also, *Prole* v. *Wiggins*, 3 Bing., N. C. 230; *Paxton* v. *Popham*, 9 East, 408; *Pole* v. *Harrobin*, *Id.* 417, n.; *Gas Light and Coke Co.* v. *Turner*, 5 Bing., N. C. 666; S. C., 6 *Id.* 324; *Cuthbert* v. *Haley*, 8 T. R. 390.

suppression of a prosecution should not be made matter of private bargain;" and it was accordingly held in a recent case (*y*), that a promissory note given in consideration of the payee's forbearing to prosecute against the maker a charge of obtaining money by false pretences was illegal, and could not be enforced (*z*).

Contract, when invalid.

As a general rule, then, a contract or an agreement cannot be made the subject of an action if it be impeachable on the ground of dishonesty, or as being opposed to public policy,—if it be either *contra bonos mores*, or forbidden by the law (*a*). In answer to an action founded on such an agreement, the maxim may be urged, *Ex maleficio non oritur contractus* (*b*)—a contract cannot arise out of an act radically vicious and illegal; those who come into a court of justice to seek redress must come with clean hands, and must disclose a transaction warranted by law (*c*); and "it is quite clear, that a court of justice can give no assistance to the enforcement of contracts which the law of the land has interdicted" (*d*).

(*y*) *Clubb* v. *Hutson*, 18 C. B. N. S. 414, 417, following *Keir* v. *Leeman*, 9 Q. B. 371.

(*z*) See *Fisher* v. *Apollinaris Co.*, L. R. 10 Ch. App. 297; 44 L. J. Ch. 500, where criminal proceedings were compromised and the compromise upheld.

(*a*) *Per* Lord Kenyon, C.J., 6 T. R. 16; *Stevens* v. *Gourley*, 7 C. B. N. S. 99; *Cunard* v. *Hyde*, 2 E. & E. 1. See, *per* Holroyd, J., 2 B. & Ald. 103; *per* Martin, B., *Horton* v. *Westminster Improvement Commissioners*, 7 Exch. 791.

As to contracts void on the ground of maintenance or champerty, see *Earle* v. *Hopwood*, 9 C. B. N. S. 567; *Simpson* v. *Lamb*, 7 C. B. N. S. 84; *Sprye* v. *Porter*, *Id.* 58; *Anderson* v. *Radcliffe*, E. B. & E. 806; *Grell* v. *Levy*, 16 C. B. N. S. 73.

(*b*) Judgm., 1 T. R. 734; *Parsons* v. *Thompson*, 1 H. Bla. 322; 8 Wheaton (U. S.), R. 152. See *Nicholson* v. *Gooch*, 5 E. & B. 999, 1015, which forcibly illustrates the above maxim.

(*c*) *Per* Lord Kenyon, C.J., *Petrie* v. *Hannay*, 3 T. R. 422.

(*d*) *Per* Lord Eldon, C., 2 Rose, 351.

It does not fall within the plan of this work to enumerate, much less to consider at length, the different grounds on which a contract may be invalidated for illegality (*e*). We shall merely cite some few cases in illustration of the above remarks. In strict accordance with them, it has been held, that no action could be maintained on a bond given to a person in consideration of his doing, and inducing others to do, something contrary to the terms of letters patent; and that the obligee was equally incapable of recovering, whether he knew or did not know the terms of the letters patent—the ignorance, if in fact it existed, resulting from his own fault (*f*). "The question," said Lord *Tenterden*, in the case here alluded to, "comes to this: can a man have the benefit of a bond by the condition of which he undertakes to violate the law? It seems to me that it would not be according to the principles of the law of England, which is a law of reason and justice, to allow a man to maintain an action under such circumstances; it would be to hold out an encouragement to any man to induce others to become dupes, and to pay their money for that from which they could derive no advantage."

Examples of rule. Bond—for unlawful purpose.

(*e*) The following cases may, however, be mentioned with reference to this subject, in addition to those already cited: *Simpson* v. *Lord Howden*, 9 Cl. & Fin. 61; cited *per* Lord Campbell, C.J., *Hall* v. *Dyson*, 17 Q. B. 791 (as to which see *Hills* v. *Mitson*, 8 Exch. 751); and *per* Lord St. Leonards, C., *Hawkes* v. *Eastern Counties R. C.*, 1 De G. M. & G. 753; S. C., affirmed 5 H. L. Cas. 331; *Preston* v. *Liverpool, Manchester, &c., R. C.*, 5 H. L. Cas. 605; *Jones* v. *Waite*, 9 Cl. & Fin. 101; *Mittelholzer* v. *Fullarton*, 6 Q. B. 982, 1022; *Santos* v. *Illidge*, 8 C. B. N. S. 861; S. C., 6 *Id.* 841; *Bousfield* v. *Wilson*, 16 M. & W. 185. In the great case of *Attwood* v. *Small*, 6 Cl. & Fin. 232, the effect of fraud on a contract of sale was much considered; but this case properly falls under the maxim, *Caveat emptor*, to which, therefore, the reader is referred.

(*f*) *Duvergier* v. *Fellowes*, 1 Cl. & Fin. 39.

Judgment obtained by collusion.

In *scire facias* against the defendant as member of a certain steam-packet company, the plea stated that the original action was for a demand in respect of which neither the defendant in the *sci. fa.*, the packet company, nor the defendant in the original action (the public officer of the company), was by law liable, as plaintiff at the commencement of the action well knew; and that, such registered officer and the plaintiff well knowing the premises, the said officer fraudulently and deceitfully, and by connivance with plaintiff, suffered the judgment in order to charge the defendant in *sci. fa.* The Court held the plea to be good, and further observed, that fraud *no doubt vitiates everything* (*g*); and that, upon being satisfied of such fraud, they possessed power to vacate, and would vacate, their own judgment (*h*).

Agreement to oust Court of jurisdiction.

To take another illustration of the maxim before us, wholly different from the preceding.

The distinction above set forth may be thus exemplified: if the contract in question be a policy of insurance against fire, and is in such terms that a reference to a third person or to a board of directors is a condition precedent to the right of the assured, in case of loss, to maintain an action, then he is not entitled to maintain it until that condition is complied with; but if, on the other hand, the contract is to pay for the loss, with a subsequent contract to refer

(*g*) See, for instance, *Foster* v. *Mackinnon*, L. R. 4 C. P. 704, 711; 38 L. J. C. P. 310.

A copyright may be defeated on the ground of fraud; *Wright* v. *Tallis*, 1 C. B. 893.

In *The Carron Co.* v. *Hunter*, L. R. 1 Sc. App. Cas. 362, a bequest of shares was held not to be nullified by a fraudulent concealment of their real value.

(*h*) *Philipson* v. *Earl of Egremont*, 6 Q. B. 587, 605; *Dodgson* v. *Scott*, 2 Exch. 457, and cases cited *ante*, p. 688. *Et vide*, *per* Pollock, C.B., *Rogers* v. *Hadley*, 32 L. J. Ex. 248.

the question to arbitration, contained in a distinct clause collateral to the other, then that contract for reference shall not oust the jurisdiction of the courts, or deprive the party of his action (*i*).

Dantis et accipientis turpitudo.

Further, it is an indisputable proposition, that as against an innocent party, "no man shall set up his own iniquity as a defence any more than as a cause of action" (*k*). Where, however, a contract or deed is made for an illegal purpose, a defendant against whom it is sought to be enforced may show the turpitude of both himself and the plaintiff, and a court of justice will decline its aid to enforce a contract thus wrongfully entered into. For instance, money cannot be recovered which has been paid *ex turpi causâ, quum dantis æque et accipientis turpitudo versatur* (*l*). An unlawful agreement, it has been said, can convey no rights in any court to either party; and will not be enforced at law or in equity in favour of one against the other of two persons equally culpable (*m*). A person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is to be used for that purpose is precluded from recovering the price of the thing so supplied. "Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, *ex turpi causâ non oritur actio,* and whether it is an immoral or an illegal purpose in which the plaintiff has participated it comes equally within the terms of that

(*i*) *Elliott* v. *Royal Exch. Ass. Co.*, L. R. 2 Ex. 237, 243; and *supra*, pp. 695–6.

(*k*) *Per* Lord Mansfield, C.J., *Montefiori* v. *Montefiori*, 1 W. Bla. 364; cited, *per* Abbott, C.J., 2 B. & Ald. 368. It is a maxim, that *Jus ex injuriâ non oritur;* see Arg., 4 Bing. 639.

(*l*) 1 Pothier, Traité de Vente, 186.

(*m*) *Per* Lord Brougham, C., *Armstrong* v. *Armstrong*, 3 My. & K. 64.

maxim, and the effect is the same; no cause of action can arise out of either the one or the other" (*n*).

Principle of rule.

The principle on which the rule above laid down depends is, as stated by Chief Justice *Wilmot*, the public good. "The objection," says Lord *Mansfield* (*o*), "that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff—by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appear to arise *ex turpi causâ* or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, *Potior est conditio defendentis*" (*p*).

(*n*) *Pearce* v. *Brooks*, L. R. 1 Ex. 213, 218; *Cowan* v. *Milbourn*, L. R. 2 Ex. 230.

(*o*) *Holman* v. *Johnson*, Cowp. 343; and *Lightfoot* v. *Tenant*, 1 B. & P. 554; which cases are cited in *Hobbs* v. *Henning*, 17 C. B. N. S. 819, as showing "the distinction between a mere mental purpose that an unlawful act should be done, and a participation in the unlawful transaction itself." *Jackson* v. *Duchaire*, 3 T. R. 551, 553; cited, *Spencer* v. *Handley*, 5 Scott, N. R. 558.

(*p*) See, also, Arg., 15 Peters (U. S.), R. 471; *per* Tindal, C.J., 2 C. B. 512.

Rule, how qualified.

It may here be proper to observe, that, although a Court will not assist in giving effect to a contract which is "expressly or by implication forbidden by the statute or common law," or which is "contrary to justice, morality, and sound policy;" yet where the consideration and the matter to be performed are both legal, a plaintiff will not be precluded from recovering by an infringement of the law in the performance of something to be done on his part; such infringement not having been contemplated by the contracting parties (*q*).

In determining, moreover, the effect of a penal statute (*r*) upon the validity of a contract entered into by one who has failed in some respects to comply with its provisions, it is necessary to consider whether the object of the statute was merely to inflict a penalty on the offending party for the benefit of the revenue, or whether the legislature intended to prohibit the contract itself for the protection of the public. In the former case, an action may lie upon the contract; but in the latter case the maxim under consideration will apply, and even if the contract be prohibited for revenue purposes only, it will be altogether illegal and void, and no action will be maintainable upon it (*s*).

(*q*) *Wetherell* v. *Jones*, 3 B. & Ad. 225, 226. See *Redmond* v. *Smith*, 8 Scott, N. R. 250.

(*r*) With reference to a breach of the Revenue Laws Lord Stowell observes, "It is sufficient if there is a contravention of the law—if there is a *fraus in legem*. Whether that may have arisen from mistaken apprehension, from carelessness, or from any other cause, it is not material to inquire. In these cases it is not necessary to prove actual and personal fraud." *The Reward*, 2 Dods. Adm. R. 271.

(*s*) *D'Allex* v. *Jones* (Exch.), 2 Jur. N. S. 972; *Taylor* v. *Crowland Gas and Coke Co.*, 10 Exch. 293, 296; *Bailey* v. *Harris*, 12 Q. B. 905; *Smith* v. *Mawhood*, 14 M. & W. 452; *Cope* v. *Rowlands*, 2 M. & W. 149; *Cundell* v. *Dawson*, 4 C. B. 376; *Pidgeon* v. *Burslem*, 3 Exch. 465; *Ould* v. *Harrison*, 10 Exch.

Divisible contract.

It must be observed, however, that a contract, although illegal and void as to part, will not necessarily be void *in toto*. Thus, if there be a bond, with condition to do several things, some of which are agreeable to law and some against the common law, the bond shall be good as to the former, and void as to the latter only (*t*); and this rule is generally true with respect to a contract void and illegal in part as against public policy, and yet good as to the residue. Where, for instance, the defendant covenanted that he would not, during his life, carry on the trade of a perfumer "within the cities of London and Westminster, *or* within the distance of 600 miles from the same respectively," the Court held that the covenant was divisible, and was good so far as it related to the cities of London and Westminster, though void as to the residue (*u*).

As previously stated a contract prohibiting the parties to it from bringing an action, and all agreements purporting to oust the courts of their jurisdiction, are void (*x*); but if the contract or agreement is in such terms that a reference to a third person is a condition precedent to bringing

572; *Jessopp* v. *Lutwyche*, *Id.* 614; *Rosewarne* v. *Billing*, 33 L. J. C. P. 55, 56; *Johnson* v. *Hudson*, 11 East, 180. See, *per* Holt, C.J., *Bartlett* v. *Viner*, Carth. 252; cited, Judgm., *De Begnis* v. *Armistead*, 10 Bing. 110; and in *Feryusson* v. *Norman*, 5 Bing., N. C. 85. See another instance illustrating the text, *per* Parke, B., *Bodger* v. *Arch*, 10 Exch. 337; cited, *Amos* v. *Smith*, 1 H. & C. 241. And see *Jones* v. *Giles*, 10 Exch. 119, 144; S. C., affirmed in error, 11 Exch. 393; *Ritchie* v. *Smith*, 6 C. B. 462.

(*t*) *Chesman* v. *Nainby*, 2 Ld. Raym. 1456, 1459; *Pigot's case*, 1 Rep. 27.

(*u*) *Price* v. *Green* (in error), 16 M. & W. 346; S. C., 13 *Id.* 695; following *Mallan* v. *May*, 11 M. & W. 653, and *Chesman* v. *Nainby*, *supra*. See further, as to contracts in restraint of trade, Broom's Com., 5th ed. 357 *et seq.*; *Farrer* v. *Close*, L. R. 4 Q. B. 632; *Reg.* v. *Stainer*, L. R. 1 C. C. 230.

(*x*) *Horton* v. *Sayer*, 4 H. & N. 643; *Edwards* v. *Aberayon Ins. Soc.*, 1 Q. B. D. 563; 34 L. T. 457, and *ante*, p. 691.

an action, then an action cannot be maintained until the condition has been complied with (*y*); assuming on the other hand that the agreement to refer is collateral, in other words a collateral covenant in or part of a contract divisible from the rest, in such a case an action is maintainable although there has been no arbitration (*z*).

It seems, then, upon the whole, a true proposition, that, if any part of a contract is valid, it will avail *pro tanto*, although another part of it may be prohibited by statute, provided the statute does not expressly or by necessary implication render the whole void, and provided also that the sound part can be separated from the unsound. Where, however, a particular proceeding, though not in itself illegal, is inseparably connected with another which is so, in such a manner that both form parcels of one transaction—*ex. gr.*, of one trading adventure—such transaction becomes altogether illegal, because bottomed in and originating out of that which was in itself illegal; and in this wide and comprehensive sense must therefore be understood the rule, *Ex pacto illicito non oritur actio* (*a*). And if a contract be made on several considerations, one of which is illegal, the whole promise will be void. The difference is that every part of the contract is induced and affected by the illegal consideration; whereas if the consideration is tainted

(*y*) *Scott* v. *Avery*, 5 H. L. Cas. 811; 25 L. J. Ex. 308; *London Guarantee Co.* v. *Fearnley*, 5 App. Cas. 911; 43 L. T. 390.

(*z*) *Dawson* v. *Fitzgerald*, 1 Ex. D. 257; 45 L. J. Ex. 893.

(*a*) See *Stewart* v. *Gibson*, 7 Cl. & Fin. 729.

"The general rule is that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." *Per* Willes, J., *Pickering* v. *Ilfracombe R. C.*, L. R. 3 P. C. 250.

by no illegality, but some of the conditions (if it be a bond) or promises (if it be a contract of any other description) are illegal, the illegality of those which are bad does not communicate itself to or contaminate those which are good, except where in consequence of some peculiarity in the contract its parts are inseparable or dependent upon one another (*b*).

Non-repudiation of fraudulent contract.

The effect of fraud is not absolutely to avoid a contract induced by it, but to render it voidable at the option of the party defrauded; and the contract continues valid until the party defrauded has elected to avoid it (*c*). Thus if a party be induced to purchase an article by fraudulent misrepresentations of the seller respecting it, and, after discovering the fraud, continue to deal with the article as his own, he cannot recover back the money paid from the seller; nor does there seem any authority for saying that a party must, in such a case, know all the incidents of a fraud before he deprives himself of the right of rescinding: the proper and safe course is to repudiate the whole transaction at the time of discovering the fraud (*d*). "'Where an agreement has been procured by fraud," observes *Maule*, J. (*e*), "the party defrauded

(*b*) Smith's L. C., 8th ed., vol. i. 405.

(*c*) *Reese Silver Mining Co.* v. *Smith*, L. R. 4 H. L. 64; 39 L. J. Ch. 8, 49; Addison on Contracts, 8th ed. 1177.

(*d*) *Campbell* v. *Fleming*, 1 A. & E. 40; *Clarke* v. *Dickson*, E. B. & E. 148; *Horsfall* v. *Thomas*, 1 H. & C. 90; *White* v. *Garden*, 10 C. B. 919; cited, *Billiter* v. *Young*, 6 E. & B. 25; *Harnor* v. *Groves*, 15 C. B. 667. See *Kingsford* v. *Merry*, 1 H. & N. 503; S. C., 11 Exch. 577; *Higgons* v. *Burton*, 26 L. J. Ex. 342.

(*e*) *East Anglian R. C.* v. *Eastern Counties R. C.*, 11 C. B. 803; citing *Campbell* v. *Fleming*, *supra*. Judgm., *Bwlch-y-Plwm Lead Mining Co.* v. *Baynes*, L. R. 2 Ex. 326; *Oakes* v. *Turquand*, L. R. 2 H. L. 325. In *Pilbrow* v. *Pilbrow's Atmospheric R. C.*, 5 C. B. 453, Maule, J., observes, "It is not true that a *deed* that is obtained by fraud is therefore void. The rule is that the party defrauded may, at his election, treat it as void."

may at his election treat it as void, but he must make his election within a reasonable time. The party guilty of the fraud has no such election."

Presumption against illegality.

Lastly, when the act which is the subject of the contract may, according to the circumstances, be lawful or unlawful, it will not be presumed that the contract was to do the unlawful act; the contrary is the proper inference (*f*). Thus, where an act is required to be done by a person, the omission of which would make him guilty of a criminal neglect of duty, the law presumes that he has duly performed it, and throws the burden of proving the negative on the party who may be interested in doing so (*g*). And the presumption of law is clearly against fraud (*h*).

Having in the preceding pages directed attention to some leading points connected with the *illegality* of the consideration for a promise or agreement, and having selected from very many cases some only which seemed peculiarly adapted to throw light upon the maxim, *Ex dolo malo non oritur actio*, we may further pray in aid of the above very cursory remarks respecting it, the observations already made upon the yet more general principle, that *a man shall not be permitted to take advantage of his own wrong* (*i*), and shall at once proceed to offer some remarks as to the rule that a consideration is needed to support a promise, and as to the sufficiency and essential requisites thereof.

(*f*) *Lewis* v. *Davison*, 4 M. & W. 654; 1 B. & Ald. 463; Judgm., *Garrard* v. *Hardey*, 6 Scott, N. R. 477. See, *per* Parke, B., *Jackson* v. *Cobbin*, 8 M. & W. 797; *Harrison* v. *Heathorn*, 6 Scott, N. R. 735; 10 Rep. 56; C. 2. 21. 6.

(*g*) *Williams* v. *East India Co.*, 3 East, 192; cited, *per* Lord Ellenborough, C.J., 2 M. & S. 561.

(*h*) See, *per* Parke, B., 8 Exch. 400; *per* Lord Kenyon, C.J., *R.* v. *Fillongley*, 2 T. R. 711; adopted *per* Patteson, J., *Reg.* v. *St. Marylebone*, 16 Q. B. 305. *Duke* v. *Forbes*, 1 Exch. 356, 368, shows that illegality will not be presumed. And see the maxim *Omnia præsumuntur ritè esse acta*, *post*, Chap. X.

(*i*) *Ante*, p. 273.

EX NUDO PACTO NON ORITUR ACTIO. (*Noy, Max.*, 24.) —*No cause of action arises from a bare promise.*

This is an instance of a maxim which has found its way to frequent use by writers on the Law of Contracts as observed in England with a meaning widely different from that which appertained to it as employed in Roman Jurisprudence. *Nudum pactum* is defined by Ulpian, *ubi nulla subest causa propter conventionem* (*k*).

Nudum pactum in Roman law.

By *causa* were meant the formal requisites which were necessary to obtain for an engagement legal recognition, *i.e.*, that is, the ceremonial conditions which constituted *stipulatio, nexum,* &c. (*l*). The *cause d'où naisse l'obligation* of the French Civil Code is nearer in meaning to our *consideration,* but is more extensive, and may denote a mere moral duty, or a fancied duty based upon feelings of honour, and even the motive which may actuate a person in making a promise (*m*), to which the English word does not extend.

Causa.

The force of the maxim we are discussing as used in English Jurisprudence may be thus rendered in the words of Blackstone. "A consideration of some sort or other is so necessary to the forming of a contract, that a *nudum pactum,* or agreement to do or pay something on one side, without any compensation on the other, will not at law support an action; and a man cannot be compelled to perform it" (*n*). The nakedness of a promise in our

Nudum pactum in English jurisprudence.

(*k*) D. 2. 14. 7, § 4; Plowd. 309, n.; Vin. Abr., "*Nudum Pactum*" (A.). See 1 Powell, Contr., 330 *et seq.* As to the doctrine of *nudum pactum* in the civil law, see *Pillans* v. *Van Mierop,* 3 Burr. 1670 *et seq.*; 1 Fonbl. Eq., 5th ed. 335 (*a*).

(*l*) Pollock on Contr., Chap. III.

(*m*) *Ibid.*, Chap. IV.

(*n*) 3 Com. 159; Noy, Max., 9th ed., p. 348.

system consists in the absence of consideration, and not in the want of formal conditions, as, *e.g.*, writing or registration. Thus, our notion of a bare promise bears no analogy to the *nudum pactum* of the digest. The law, it has been observed (*o*), "supplies no means nor affords any remedy to compel the performance of an agreement made without sufficient consideration. Such agreement is *nudum pactum ex quo non oritur actio;* and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law."

Consideration.

The modern English doctrine of consideration has been one of gradual development, and its history is obscure. In the time of Henry VI., the word does not seem to have been in vogue, the equivalent found in cases of that period, which are extant, is *quid pro quo* (*p*), and that phrase may be said to convey an accurate idea of the connotation of the modern word, except indeed as used by conveyancers in conjunction with *good* (*q*). Consideration could not be better defined than it is in the Indian Contract Act, "when at the desire of the promisor, the promisee or any other person, has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise" (*r*). Accordingly, if I promise to pay a man 100*l.* for nothing, he neither doing nor promising anything in return or to compensate me for my money,

(*o*) *Per* Skynner, C.B., *Rann* v. *Hughes*, 7 T. R. 350, n. (*a*). See, *per* Lord Kenyon, C.J., 3 T. R. 421; Judgm., *Bank of Ireland* v. *Archer*, 11 M. & W. 389. See *McManus* v. *Bark*, L. R. 5 Ex. 65; 39 L. J. Ex. 65.

(*p*) Pollock, Contr., Chap. III.

(*q*) As to which see *postea* under this maxim.

(*r*) Indian Contract Act, sec. 2. All the definitions in this section should be carefully studied.

my promise is *nudum pactum*, and has no force in law (*s*). A gratuitous promise or undertaking may indeed form the subject of a moral obligation, and may be binding in honour, but it does not create a legal responsibility (*t*).

Contract under seal.

Where indeed a promise is made under seal, the solemnity of that mode of delivery is held to import, at law, that there was a sufficient consideration for the promise, so that the plaintiff is not in this case required to prove such consideration; nor can the deed be impeached by merely showing that it was made without consideration, unless proof be given that it originated in fraud (*u*). Neither is a consideration necessary for the validity of a deed operating at Common Law. Nevertheless if A. made a feoffment in fee to another without consideration, *equity* would presume that he meant it to the use of himself, and would therefore raise an implied resulting use in his favour (*x*). Even if he should by express limitation of uses prevent the estate from resulting at law, there would still in equity result a *trust* for his benefit. Even in the case of a deed, moreover, it is necessary to observe the distinction between a *good* and a *valuable* consideration; the former is such as that of blood, or of natural love and affection, as when a man grants an estate to a near relative, being influenced by motives of generosity, prudence, and natural duty. Deeds made upon this consideration are looked upon by the law as merely *voluntary*, and, although good

"Good" and "valuable" consideration.

(*s*) 3 Black. Com. 159; Vin. Abr., "*Contract*" (K).

(*t*) Judgm., 1 H. Bla. 327. See *Balfe* v. *West*, 13 C. B. 466; *Elsee* v. *Gatward*, 5 T. R. 143, 149.

(*u*) 2 Bla. Com., 16th ed., 446, n. (4). *Per* Parke, B., *Wallis* v. *Day*, 2 M. & W. 277.

(*x*) 1 Sand. Uses, 68.

as between the parties, are frequently set aside in favour of creditors and *bonâ fide* purchasers (*y*). On the other hand, a valuable consideration is such as money, marriage, or the like; and this is esteemed by the law as an equivalent given for the grant (*z*).

When, therefore, a question arises between one who has paid a valuable consideration for an estate, and one who has given nothing, it is a just provision of law, that such voluntary conveyance, founded only on considerations of affection and regard, should not be allowed to defeat the rights of those who may afterwards become purchasers for a valuable consideration, it being, upon the whole, more fit that a voluntary grantee should be disappointed than that a fair purchaser should be defrauded (*a*).

Consideration in simple contracts.

It is of the greatest importance to the student of English law to start with an accurate comprehension of the meaning of consideration in simple contracts. We will therefore add to what has already been said the definition of Parke, B.,—"any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, however small the benefit or inconvenience may be, is a sufficient consideration, if such act is performed or such inconvenience suffered, by the plaintiff with the consent, either express or implied, of the defendant" (*b*).

(*y*) 2 Black. Com. 479, 480, 3 *Id.* 158; *per* Lord Tenterden, C.J., *Gully* v. *Bishop of Exeter*, 10 B. & C. 606. See Bac. Max., reg. 18. See *ex parte Russell*, 51 L. J. Q. B. 521, as to when a voluntary deed will be set aside in favour of creditors.

(*z*) 2 Black. Com. 480. 3 *Id.* 158; 10 B. & C. 606.

(*a*) Judgm., *Doe* d. *Otley* v. *Manning*. 9 East, 66. See 2 Q. B. 860.

(*b*) 1 Selw., N. P., 10th ed. 41; Judgm., 2 E. & B. 487–8; *per* Parke, B., *Moss* v. *Hall*, 5 Exch. 49; *Bracewell* v. *Williams*, L. R. 2 C. P. 196; *Crowther* v. *Farrer*, 15 Q. B. 677, 680; *Hulse* v. *Hulse*, 17 C. B. 711. See, also, *Nash* v. *Armstrong*, 10 C. B. N. S. 259; *Shadwell* v.

Consideration must have some value.

The consideration for a promise must have *some* tangible value in the eye of the law (*c*). So, where in an action of *assumpsit* the consideration for the defendant's promise was stated to be the release and conveyance by the plaintiff of his interest in certain premises, at the defendant's request, but the declaration did not show that the plaintiff had any interest in the premises except a lien upon them, which was expressly reserved by him, the declaration was held bad, as disclosing no legal consideration for the alleged promise (*d*).

Adequacy not material.

It is now well settled that, as long as the consideration for a promise has some value its *adequacy* is not material (*e*). The value of all things contracted for "is measured by the appetite of the contractors, and therefore the just value is that which they be content to give" (*f*), moreover, the *consideration* may be contingent.

Value may be contingent

Shadwell, 9 C. B. N. S. 159; *Davis* v. *Nisbett*, 10 C. B. N. S. 752; *Surtees* v. *Lister*, 7 H. & N. 1; *Scotson* v. *Pegg*, 6 H. & N. 295; *Westlake* v. *Adams*, 5 C. B. N. S. 248; *Hartley* v. *Ponsonby*, 7 E. & B. 872.

(*c*) *Per* Patteson, J., *Thomas* v. *Thomas*, 2 Q. B. 859; *Price* v. *Easton*, 4 B. & Ad. 433; *Tweddle* v. *Atkinson*, 1 B. & S. 393; *Edwards* v. *Baugh*, 11 M. & W. 641; *Bridgman* v. *Dean*, 7 Exch. 199; *Wade* v. *Simeon*, 2 C. B. 548; *Llewellyn* v. *Llewellyn*, 15 L. J., Q. B. 4; *Crow* v. *Rogers*, 1 Stra. 592; *Lilly* v. *Hays*, 5 A. & E. 548; approved in *Noble* v. *National Discount Co.*, 5 H. & N. 225, 228; *Galloway* v. *Jackson*, 3 Scott, N. R. 753, 763; *Thornton* v. *Jenyns*, 1 Scott, N. R. 52; *Jackson* v. *Cobbin*, 8 M. & W. 790; *Cowper* v. *Green*, 7 M. & W. 633; 1 Roll. Abr. 23, pl. 29; *Fisher* v. *Waltham*, 4 Q. B. 889; *Wilson* v *Wilson*, 1 H. L. Cas. 538; *Hart* v. *Miles*, 4 C. B. N. S. 371, and cases *infra*.

(*d*) *Kaye* v. *Dutton*, 7 M. & Gr. 807; recognising *Edwards* v. *Baugh*, 11 M. & W. 641; *Lyth* v. *Ault*, 7 Exch. 669; *Strickland* v. *Turner*, *Id.* 208; *Fremlin* v. *Hamilton*, 8 Exch. 308; see *Cooper* v. *Parker*, 14 C. B. 118; *Millward* v. *Littlewood*, 5 Exch. 775; *Wild* v. *Harris*, 7 C. B. 999; *Holmes* v. *Penney*, 9 Exch. 584, 589; *Beer* v. *Foakes*, 11 Q. B. D. 221.

(*e*) *Westlake* v. *Adams*, 5 C. B. N. S. 248, 265; 24 L. J. C. P. 271; *per* Byles, J.

(*f*) Hobbes, Leviathan, pt. 1, Ch. XV.

It may consist of something which a party does not undertake, and consequently is not bound to perform, but which being done renders the promise on the other side binding in law. Thus, if a tradesman agrees to supply on certain terms such goods as a customer may order during a future period, he cannot sue the customer for not ordering any goods, but if the customer does order any goods, the consideration becomes effectual, and a contract binding upon the tradesman immediately arises (*g*).

or problematical.

Moreover, a consideration may be good in law, although there may be merely a chance, and that a remote one, of any benefit arising to one party or detriment to the other. Thus it is a good consideration for a promise to refrain from legal proceedings which one has contemplated taking in good faith, although such proceedings have not been commenced (*h*), and it should ultimately appear that the claim to be enforced was wholly unfounded (*i*).

Consideration must be real, not illusory; must not fail through the act of the promisee.

The consideration for a contract, although its adequacy, as we have seen, will not be examined by courts of justice, must not be colourable merely nor illusory (*k*), and it is open to the promisor to shew if he can that the chance of his deriving benefit from that which is put forward as the consideration for his promise has been defeated by the act of the promisee. In such a case there is said to be a *failure of consideration.*

In debt for money had and received, &c., the defendant pleaded the execution and delivery to the plaintiff of a

(*g*) *Great Northern Ry. Co.* v. *Witham*, L. R. 9 C. P. 16; 43 L. J. C. P. 1.

(*h*) *Callisher* v. *Bischoffheim*, L. R. 5 Q. B. 449; 39 L. J. Q. B. 181; 18 W. R. 1127.

(*i*) *Willy* v. *Elgee*, L. R. 10 C. P. 497; 44 L. J. C. P. 254; 32 L. T. 310.

(*k*) *White* v. *Bluett*, 23 L. J. Exch. 36. See *Gough* v. *Findon*, 7 Exch. 48; *Frazer* v. *Hatton*, 2 C. B. N. S. 512; *Gorgier* v. *Morris*, 7 C. B. N. S. 588.

deed securing to the plaintiff a certain annuity, and acceptance of the same by the plaintiff in full satisfaction and discharge of the debt; replication, that no memorial of the annuity deed had been enrolled pursuant to the statute; that, the annuity being in arrear, the plaintiff brought an action to recover the amount of the arrears; that defendant pleaded in bar the non-enrolment of the memorial; and that plaintiff thereupon elected and agreed that the indenture should be null and void, and discontinued the action. The replication was held to be a good answer to the plea, since it showed that the accord and satisfaction thereby set up had been rendered nugatory and unavailing by the defendant's own act (*l*).

Consideration not to be confounded with motive.

The definitions of consideration which have here already been given are in themselves sufficient to preclude the possibility of its being confounded with the *motive* of a promise (*m*). Consideration may no doubt furnish the inducement for a promise, and that inducement may be a motive, but the motive is a mental fact subjective to the promisor, the consideration is objective and extraneous to his mind. A not uncommon expression, and one which involves a leading principle of the law of contracts, is that *the consideration must move from the plaintiff*. By this is meant not only that the consideration must be something external to the mind of the promisor, and therefore not a mere motive, but also, that there must have been what is called *priority of contract* between the promisor and the person who seeks to compel performance of the promise. In common parlance, the principle may be thus stated, he

Consideration must move from the plaint

(*l*) *Turner* v. *Browne*, 3 C. B. 157; *Thomas* v. *Thomas*, 2 Q. B. 851.

(*m*) *Per* Lord Denman, C.J., and Patteson, J., 859; *Id.* 861 (*a*).

alone can exact performance of a promise, who has furnished or contributed to furnish the consideration (*n*).

So where plaintiff stipulated to discharge A. from a portion of a debt due to himself, and to permit B. to stand in his place as to that portion, defendant stipulating, in return, that B. should give plaintiff a promissory note; the consideration moving from plaintiff, and being an undertaking detrimental to him, was held sufficient to sustain the promise by defendant (*o*). Where, however, A. being indebted to plaintiff in a certain amount, and B. being indebted to A. in another amount, the defendant, in consideration of being permitted by A. to sue B. in his name, promised to pay A.'s debt to the plaintiff, and A. gave such permission, whereupon defendant recovered from B., judgment was arrested, on the ground that plaintiff was a mere stranger to the consideration for the promise made by defendant, having done nothing of trouble to himself or of benefit to the defendant (*p*).

The question of privity of contract has been much discussed in connection with the relationship of a county solicitor with his client and town agent respectively. It has been more than once subject of inquiry whether such privity exists in the case of the two last-mentioned as would entitle one to sue the other. Where B., the country attorney of A., sent a sum of money to the de-

(*n*) See *Playford* v. *United Kingdom Telegraph Co.*, L. R. 4 Q. B. 706; *Becher* v. *Great Eastern R. C.*, L. R. 5 Q. B. 241; *Jennings* v. *Great Northern R. C.*, L. R. 1 Q. B. 7; *Alton* v. *Midland R. C.*, 19 C. B. N. S. 213; *Watson* v. *Russell*, 5 B. & S. 968: S. C., 3 *Id.* 34.

(*o*) *Peate* v. *Dicken*, 1 Cr. M. & R. 422; *Tipper* v. *Bicknell*, 3 Bing., N. C. 710; *Harper* v. *Williams*, 4 Q. B. 219; and *Dashwood* v. *Jermyn*, 12 Ch. D. 776: 27 W. R. 868.

(*p*) *Bourne* v. *Mason*, 1 Ventr. 6; *Liversidge* v. *Broadbent*, 4 H. & N. 603, 610, and *Tweddle* v. *Atkinson*, 1 B. & S. 393, also illustrate the maxim *supra*.

fendants, who were his London agents, to be paid to C., on account of A., and the defendants promised B. to pay the money according to his directions, but afterwards, being applied to by C., refused to pay it, claiming a balance due to themselves from B. on a general account between them, it was held that an action for money had and received would not lie against the defendants at the suit of A. (*q*). "The general rule," observed Lord *Denman*, C.J., "undoubtedly is, that there is no *privity* between the agent in town and the client in the country; and the former cannot maintain an action against the latter for his fees, nor the latter against the former for negligence." (*r*).

A. employs B., an attorney, to do an act for the benefit of C., A. having to pay B., and there being no intercourse of any sort between B. and C. If, through the gross negligence or ignorance of B. in transacting the business, C. loses the benefit intended for him by A., C. cannot maintain an action against B. to recover damages for the loss sustained. If the law were otherwise, a disappointed legatee might sue the solicitor employed by a testator to make a will in favour of a stranger, whom the solicitor never saw or before heard of, if the will were void for not being properly signed and attested (*s*).

(*q*) *Cobb* v. *Becke*, 6 Q. B. 930; *Robbins* v. *Fennell*, 11 Q. B. 248; *Bluck* v. *Siddaway*, 15 L. J., Q. B. 359; *Hooper* v. *Treffry*, 1 Exch. 17. See *Litt* v. *Martindale*, 18 C. B. 314, where there seems to have been very slight (if any) evidence of privity; *Johnson* v. *Royal Mail Steam Packet Co.*, L. R. 3 C. P. 38; *Moore* v. *Bushell*, 27 L. J., Exch. 3; *Gerhard* v. *Bates*, 2 E. & B. 476; *Brewer* v. *Jones*, 10 Exch. 655; *Barkworth* v. *Ellerman*, 6 H. & N. 605; *Painter* v. *Abel*, 2 H. & C. 113; *Collins* v. *Brook*, 5 H. & N. 700; S. C., 4 *Id.* 270.

(*r*) For recent cases on this subject see *Lawrence* v. *Fletcher*, 12 Ch. D. 858: 27 W. R. 937; *Vyse* v. *Foster*, 32 L. T. 219: 23 W. R. 413; *Re Edwards*, 7 Q. B. D. 155: 50 L. J., Q. B. 541: 45 L. T. 211: 30 W. R. 14 (C. A.): 45 L. T. 578.

(*s*) *Per* Lord Campbell, C., *Robertson* v. *Fleming*, 4 Macq. Sc. App. Cas. 177.

Moral obligation does not constitute consideration.

As will shortly be seen nothing which has been done or suffered by the promisee antecedently to the promise will constitute a good consideration for the promise unless it has been done or suffered at the request of the promisor. In certain cases it was once thought that where the plaintiff voluntarily did that which the defendant was morally bound to do, and the defendant afterwards expressly promised to repay him, a previous request would be implied, so that the moral duty attaching to the defendant would be a valid consideration for his promise (*t*). It never was considered that every moral consideration was sufficient for this purpose (*u*). After considerable controversy it was finally settled in the case of *Eastwood* v. *Kenyon* (*x*), that a mere moral obligation arising from a past benefit not conferred at the request of the defendant is not a good consideration, and that the class of consideration derived from moral obligation includes only those cases in which there has been a legal right deprived of legal remedy. In such cases, as will be seen, the defendant may be held liable, without putting moral duty on a par with legal consideration (*y*). It is now past controversy that mere moral feeling is not enough to affect the legal rights of parties (*z*); nor can a subsequent

As to privity in connection with the relation of attorney and client, see *Fish* v. *Kelly*, 17 C. B. N. S. 194 *Helps* v. *Clayton*, *Id.* 553.

(*t*) *Lee* v. *Muggeridge*, 5 Taunt. 36; *Watson* v. *Turner*, B. N. P. 129, 147, 281; *Trueman* v. *Fenton*, Cowp. 544; *Atkins* v. *Banwell*, 2 East, 505.

(*u*) *Per* Lord Tenterden, C.J., *Littlefield* v. *Shee*, 2 B. & Ad. 811.

(*x*) 11 A. & E. 438, 446.

(*y*) See *postea*, pp. 750, *et seq.*

(*z*) *Per* Lord Denman, C.J., *Beaumont* v. *Reeve*, 8 Q. B. 483; cited and recognised, *Fisher* v. *Bridges*, 3 E. & B. 642: S. C., 2 *Id.* 118; *Eastwood* v. *Kenyon*, 11 A. & E. 438; *Wennall* v. *Adney*, 3 B. & P. 247, 249, (*a*). In *Jennings* v. *Brown*, 9 M. & W. 501, Parke, B., observes, in reference to *Binnington* v. *Wallis* (4 B. & Ald. 650), that the giving up the annuity was "a mere moral consideration, which is nothing."

express promise convert into a debt that which of itself was not a legal debt (*a*); and although the mere fact of giving a promise creates a moral obligation to perform it, yet the enforcement of such promises by law, however plausibly justified by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors (*b*).

Bills of exchange—Promissory notes.

As regards bills of exchange and promissory notes the rule is, that either of these instruments is presumed to be made upon, and *primâ facie* imports, consideration (*c*). And the words "value received" express only what the law will imply from the nature of the instrument, and the relation of the parties apparent upon it (*d*), and then the maxim *Expressio eorum quæ tacitè insunt nihil operatur*, is applicable (*e*). In an action upon a bill or note between the immediate parties thereto, the consideration may be inquired into; and if it be proved that the plaintiff gave, and the defendant received, no value, the action will fail (*f*). Or it may fail only in part where the consideration is divisible and has failed in part. Where, observes *Cresswell*, J. (*g*), there is a promise to pay a cer-

(*a*) *Per* Tindal, C.J., *Kaye* v. *Dutton*, 7 M. & Gr. 811–12.

(*b*) Judgm., 11 A. & E. 450, 451. See *Roberts* v. *Smith*, 4 H. & N. 315.

(*c*) *Per* Martin, B., 1 H. & C. 710; *Watson* v. *Russell*, 3 B. & S. 34.

(*d*) *Hatch* v. *Trayes*, 11 A. & E. 702; *per* Lord Ellenborough, C.J., *Grant* v. *Da Costa*, 3 M. & S. 352.

(*e*) *Ante*, p. 625.

(*f*) *Southall* v. *Rigg*, and *Forman* v. *Wright*, 11 C. B. 481, 492; *Crofts* v. *Beale*, 11 C. B. 172; *Kearns* v. *Durell*, 6 *Id.* 596; and cases cited *infra*.

(*g*) 11 C. B. 494; see *Warwick* v. *Nairn*, 10 Exch. 762.

tain sum, all being supposed to be due, "each part of the money expressed to be due is the consideration for each part of the promise; and the consideration as to any part failing, the promise is *pro tanto nudum pactum*."

In actions not between immediate parties to a bill or note, the established rule is, that some suspicion must be cast upon the plaintiff's title before he can be compelled to prove what consideration he has given for it. If, for instance, a promissory note were proved to have been obtained by fraud, or affected by illegality, such proof affords a presumption that the person guilty of the illegality would dispose of it, and would place it in the hands of another person to sue upon it, and consequently casts upon the plaintiff the burden of showing that he was a *bonâ fide* indorsee for value (*h*).

Different kinds of consideration.

Having thus briefly shown the nature of the *consideration* and of the *privity* which are necessary to a valid contract, we may proceed to specify the important distinctions which exist between consideration, *executed*, *concurrent*, *continuing*, and *executory*. These terms as used to qualify consideration are relative in point of time to the promise. The following example will serve as an introductory illustration:

A declaration in *assumpsit* stated that in consideration of the plaintiff's *agreeing* to stay proceedings in an action against B., the defendant promised to pay the

(*h*) *Per* Parke, B., *Bailey* v. *Bidwell*, 13 M. & W. 73; *Boden* v. *Wright*, 12 C. B. 445; *Smith* v. *Braine*, 16 Q. B. 244, 250-1; *Harvey* v. *Towers*, 6 Exch. 656; *Mather* v. *Lord Maidstone*, 1 C. B. N. S. 273: S. C., 18 C. B. 273; *Hall* v. *Featherstone*, 3 H. & N. 284; *Berry* v. *Alderman*, 14 C. B. 95; *Dobie* v. *Larkan*, 10 Exch. 776. The proposition stated in the text is more fully set forth, *per* Lord Campbell, C.J., *Fitch* v. *Jones*, 5 E. & B. 238. See also *Munroe* v. *Bordier*, 8 C. B. 862; Judgm., *May* v. *Seyler*, 2 Exch. 566; *Robinson* v. *Reynolds* (in error), 2 Q. B. 196.

amount upon a certain event; at the trial, the following agreement was proved: "In consideration of the plaintiff's *having agreed* to stay proceedings against B., &c.;" it was held that the contract was an executory contract, and a continuing agreement to stay proceedings, and that there was therefore no variance (*i*).

In this case *having agreed* before the date of the promise would indicate an *executed* consideration, *agreeing* might constitute a *concurrent* consideration (*i.e.* coincident in point of time with the promise), or *executory* (*i.e.* to be performed after the promise).

Consideration must be moved by request.

It will appear from the definitions of consideration above cited (*k*), that it is necessary that the service which is advanced as the consideration for a promise should be undertaken at the instance or request of the promisor. This is the meaning of the decision in the leading case of *Lampleigh* v. *Braithwaite* (*l*), that a mere voluntary courtesy will not support an assumpsit, but a courtesy moved by a previous request will. In the case of a service which is not past or executed at the date of the time of the promise, it is obvious that a request on the part of the promisor is a logical necessity. To promise something in consideration that another will in the future do or suffer something (executory consideration), or will continue to do or suffer something (continuing) or will *hic et nunc* do or suffer something (concurrent) is itself a request.

In case of past service, request must be proved.

Where, however, the service is past or executed at the date of the promise, it is, as a rule, necessary to show that the service was undertaken at the request of the

(*i*) *Tanner* v. *Moore*, 9 Q. B. 9.
(*k*) *Ante*, pp. 700, 702.
(*l*) 1 Sm. L. C., 8th ed., p. 151: Hob. R. 106; *per* Parke, J., *Reason* v. *Wirdnam*, 1 C. & P. 434: 1 Wms. Saund. 264 (1).

promisor. For, to take a simple illustration, if a man disburse money about the affairs of another, without request, and then afterwards the latter promise to repay him (*m*), you have wanting an essential element of valid legal consideration.

Cases of executed service where it is not necessary to prove request.

Although generally speaking in the case of *executed* considerations it is necessary that request should be laid and proved, there are cases of past consideration, where, as in the case of executory service, the nature of the consideration itself imports a request (*n*). Thus, in an action of assumpsit for money *lent*, it was held unnecessary to allege that the money was lent at the defendant's request; for there cannot be a claim for money lent unless there be a loan, and a loan implies an obligation to pay (*o*). In the case of money *paid*, however, the above doctrine will not apply, because a gratuitous payment would not create a legal obligation; and "no man can be a debtor for money paid unless it was paid at his request" (*p*).

Request implied in certain cases.

Moreover there are circumstances under which the law will itself imply by a fiction that the service has been

(*m*) *Per* Tindal, C.J., *Thornton* v. *Jenyns*, 1 Scott, N. R. 74, citing *Hunt* v. *Bate*, Dyer, 272, and 1 Roll. Abr. 11. See particularly *Roscorla* v. *Thomas*, 3 Q. B. 234.

(*n*) See 1 M. & Gr. 265, note; cited *per* Parke, B. 12 M. & W. 759.

(*o*) *Victors* v. *Davies*, 12 M. & W. 758; *per* Pollock, C.B., 1 H. & C. 716; *M'Gregor* v. *Graves*, 3 Exch. 34.

(*p*) *Per* Parke, B., 12 M. & W. 760; *Brittain* v. *Lloyd*, 14 M. & W. 762; cited in *Lewis* v. *Campbell*, 8 C. B. 541, 547; and *per* Parke, B., *Hutchinson* v. *Sydney*, 10 Exch. 439. See the Forms, 15 & 16 Vict. c. 76, Sched. (B.), Nos. 3, 4.

Hayes v. *Warren*, 2 Stra. 933, cited 1 Wms. Saund. 264 (1). See, in further illustration of the subject above touched upon, *Dietrichsen* v. *Grubelei*, 14 M. & W. 845; *per* Parke, B., *King* v. *Sears*, 2 Cr. M. & R. 53; *Emmens* v. *Elderton*, 4 H. L. Cas. 624.

undertaken by request of the promissor. Such request is implied in the following cases:—

I. Where the defendant has adopted and enjoyed the benefit of the consideration, for in that case the maxim applies which will be hereafter considered, *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur* (*q*).

II. When the service consists in the plaintiff having been compelled to do that which the defendant was legally compellable (*r*). But it would seem that this proposition must be limited to cases in which some privity existed between the plaintiff and the defendant at the time of the compulsion. Where, for instance, a stranger's goods have been distrained for rent due from a tenant, and the stranger having ransomed the goods, seeks to recover the sum he has paid, from the tenant, he must show that the goods were on the premises at the request, expressed or implied, of the tenant (*s*). On the above principle depends the right of a surety, who has been damnified, to recover an indemnity from his principal (*t*), or contribution from a co-surety or joint contractor (*u*).

(*q*) *Pawle* v. *Gunn*, 4 B. N. C. 448; *Barber* v. *Brown*, 1 C. B. N. S. 121. See, also, 1 Wms. Saund. 264 (1); *Simpson* v. *Eggington*, 10 Exch. 845; *Streeter* v. *Horlock*, 1 Bing. 34.

(*r*) *Jeffreys* v. *Gurr*, 2 B. & Ald. 833; *Pownall* v. *Ferrand*, 6 B. & C. 439; *Exall* v. *Partridge*, 8 T. R. 308; *Gressell* v. *Robinson*, 3 Bing. N. C. 13; *Cornell* v. *McGorlish*, 12 Ir. C. L. 153; *Bradshaw* v. *Beard*, 12 C. B. N. S. 344.

(*s*) As to what amounts to compulsion, see *Johnson* v. *R. Mail S. Packet Co.*, L. R. 3 C. P. 38; 37 L. J. C. P. 33.

(*t*) *Toussaint* v. *Martinnant*, 2 T. R. 100; *Done* v. *Walley*, 2 Exch. 198.

(*u*) *Per* Lord Kenyon, C.J., 8 T. R. 186; *Batard* v. *Hawes*, 3 E. & B. 287, 296; *Earl of Mountcashell* v. *Barber*, 14 C. B. 53; *Holmes* v. *Williamson*, 6 M. & S. 158; *Kemp* v. *Finden*, 12 M. & W. 421; *Edger* v. *Knapp*, 6 Scott, N. R. 707; *Davies* v. *Humphreys*, 6 M. & W. 153, 168; *Browne* v. *Lee*, 6 B. & C. 689; *Cowell* v. *Edwards*, 2 B. & P. 268. See *Reynolds* v. *Wheeler*, 10 C. B. N. S. 561.

III. When the plaintiff *voluntarily* does that which the defendant might have been legally compelled to do, and the defendant afterwards in consideration of the service *expressly* promises (*x*). It is to be noticed that in the case of voluntary service, a subsequent express promise is necessary to support an action, whereas in the cases under the two former heads, the promise is implied as well as the request (*y*).

Where suspended right of action is revived by express promise.

A distinction will be noted between cases like the above, and those in which it has been held that an express promise may effectually revive a precedent good consideration, which might have afforded grounds for an action upon a promise implied from such consideration, were it not for the interference of some positive rule of law, which has suspended the action or remedy without destroying the right. Thus a debt barred by the Statute of Limitations is still a good consideration for a promise in writing to pay (*z*), for the Statute of Limitations admits the cause or consideration of the action still existing, and merely discharges the defendant from the remedy (*a*).

"The cases," says Lord *Denman*, C.J. (*b*), "in which it has been held, that, under certain circumstances, a consideration insufficient to raise an implied promise will nevertheless support an express one, will be found collected and reviewed in the note to *Wennall* v. *Adney* (*c*),

(*x*) *Wennall* v. *Adney*, 3 B. & P. 250; *in notis*, *Wing* v. *Mill*, 1 B. & A. 104; *Paynter* v. *Williams*, 1 C. & M. 818.

(*y*) *Atkins* v. *Banwell*, 2 East, 505.

(*z*) *La Touche* v. *La Touche*, 3 H. & C. 576–588. See *Lee* v. *Wilmot*, L. R. 1 Ex. 364; *Bush* v. *Martin*, 2 H. & C. 311.

(*a*) Wms. Saunders, 163; *Scarpellini* v. *Atcheson*, 7 Q. B. at p. 878.

(*b*) *Roscorla* v. *Thomas*, 3 Q. B. 237; Judgm., 1 C. B. 870.

(*c*) 3 B. & P. 249.

and in the case of *Eastwood* v. *Kenyon* (*d*). They are cases of *voidable* contracts subsequently ratified, of debts barred by operation of law subsequently revived, and of equitable and moral obligations, which, but for some rule of law, would of themselves have been sufficient to raise an implied promise."

At one time there was an inclination to explain the rule stated as above by Lord *Denman*, and previously laid down by Lord *Mansfield* (*e*) as depending upon the moral obligation arising from the previous agreement (*f*).

It is not easy to conceive how such a theory was reconciled with the fact, that an express promise was ineffectual where the original contract to which it had reference was not merely suspended for a time or voidable at the option of the defendant, but absolutely void at law. While, on the other hand, it was always understood that where the validity of an agreement is not affected by statute, but the remedy of one party is suspended, an express promise subsequently made will have relation back to the previous consideration, and will not be treated as *Nudum pactum* (*g*).

Promises to pay a debt simply, or by instalments, or when the party is able, are all equally supported by the past consideration, and, when the debts have become payable *instanter*, may be given in evidence in support of the ordinary indebitatus counts. So when the debt is not already barred by the statute, a promise to pay the creditor will revive it and make it a new debt, and a promise to an executor to pay a debt due to a testator creates a new debt to him. But it does not follow that

Illustrations.

(*d*) 11 A. & E. 438.

(*e*) *Hawkes* v. *Sanders*, Cowp. 290; *Atkins* v. *Hill*, *Id.* 288.

(*f*) Leake, Law of Contracts, 615.

(*g*) See Pollock, Contr. Chap. XII. Judgm., *Earle* v. *Oliver*, 2 Exch. 90

though a promise revives the debt in such cases, any of those debts will be a sufficient consideration to support a promise to do a collateral thing, as to supply goods or perform work and labour (*h*). In such case it is but an accord unexecuted, and no action will lie for not executing it (*i*).

Infants.

Formerly many contracts entered into by infants were not void, but merely voidable at the option of the infant. Accordingly an express promise made by him after full age would revive the previous consideration so as to remove the subsequent promise from the category of *nuda pacta* (*k*); but as we have seen, since the Infant Relief Act, 1874 (*l*), this is no longer so, for sec. 2 of that statute expressly enacts that no action shall be brought to charge any one upon any such promise (*m*). The contract of a married woman was at one time absolutely void (*n*); and, therefore, if the record stated that goods were supplied to a married woman, who, after her husband's death, promised to pay, this would not be sufficient, because the debt was never owing from her (*o*).

Married women.

Debts discharged by bankruptcy.

Another illustration, which would suffice, if it were necessary, to refute the theory of moral obligation, is afforded by the case of a person who promises to repay a

(*h*) Citing *Reeves* v. *Hearne*, 1 M. & W. 323.

(*i*) Judgm., 2 Exch. 90; *per* Parke, B., *Smith* v. *Thorne*, 18 Q. B. 139.

(*k*) *Per* Patteson, J., 8 A. & E. 470. See the note (*a*) to *Wennall* v. *Adney*, 3 B. & P. 249.

(*l*) 37 & 38 Vict. c. 62, *ante*, p. 655.

(*m*) For the effect of this St., see Pollock, Contr. Ch. II., pt. 1.

(*n*) See *Neve* v. *Hollands*, 18 Q. B. 262.

(*o*) *Meyer* v. *Haworth*, 8 A. & E. 467, 469. In *Traver* v. ——, 1 Sid. 57, a woman, after her husband's death, promised the plaintiff, a creditor, that, if he would prove that her husband had owed him £20, she would pay the money. This was held a good consideration, "because it was a trouble and charge to the creditor to prove his debt." See *Cope* v. *Albinson*, 8 Exch. 185.

debt from which he has been discharged by a bankruptcy. The 12 & 13 Vict. c. 106 (Bankruptcy Law Consolidation Act, 1849), expressly annulled the efficacy of such promise which previously might have been enforced. A similar provision was contained in the Act of 1861, but not in that of 1869, and, consequently, the question was more than once raised under the last-mentioned statute, whether the Common Law was revived in consequence of the omission. It was, however, decided that the policy of the Bankruptcy Laws was sufficient without express statutory enactment to render ineffectual any attempt to resuscitate a debt from which a person had been discharged by bankruptcy (*p*).

Statute of Frauds.

Again there are cases of agreements coming within the purview of the 4th section of the Statute of Frauds, in which *no action can be brought* on account of the absence of a written memorandum, but in which a subsequent promise may nevertheless furnish a ground of action.

A verbal agreement was entered into between the plaintiff and defendants respecting the transfer of an interest in land. The transfer was effected, and nothing remained to be done but to pay the consideration; it was held, that the agreement not being in writing, as required by the Statute of Frauds, could not be enforced by action, but that, the transferee, after the transfer, having admitted to the transferor that he owed him the stipulated price, the amount might be recovered upon the count upon an account stated in the declaration (*q*). Also bills of

(*p*) *Heather* v. *Webb*, 2 C. P. D. 1; 46 L. J. C. P. 89.

(*q*) *Cocking* v. *Ward*, 1 C. B. 858, 870. See *Lemere* v. *Elliott*, 6 H. & N. 656; *Smart* v. *Harding*, 15 C. B. 652, 659; *Green* v. *Saddington*, 7 E. & B. 503.

As to the condition under which

Usury laws.

exchange given after the repeal of the usury law by 17 & 18 Vict. c. 90, in renewal of bills given while that law was in force to secure payment of money lent at usurious interest, have been held valid, the receipt of the money being a sufficient consideration to support a new promise to pay it. In the case referred to, this qualified proposition was sanctioned by the majority of the court: "That a man by express promise may render himself liable to pay back money which he has received as a loan, though some positive rule of law or statute intervened at the time to prevent the transaction from constituting a legal debt" (*r*).

Promise express or implied.

We must, in the next place, observe that the subsequent promise, like the antecedent request, may, in many cases, be implied. For instance, the very name of a loan imports that it was the understanding and intention of both parties that the money should be repaid (*s*), a promise to pay interest will be implied by law from the forbearance of money at the defendant's request (*t*); and from money being found due on accounts stated, the law implies a promise to pay it (*u*); but where the consideration has been executed, and a promise would, under the circumstances, be implied by law, it is clearly established that no express promise made in respect of that prior consideration, differing from that which by law would be implied, can be enforced (*w*): for, were it otherwise, there

part performance will take a case out of the Statute, see *Maddison* v. *Alderson*, 8 App. Cas. 466; 52 L. J. Q. B. 737. *Humphreys* v. *Green*, 10 Q. B. D. 148; 52 L. J. Q. B. 140.

(*r*) *Flight* v. *Reed*, 1 H. & C. 703, 716.

(*s*) *Per* Pollock, C.B., 1 H. & C. 716.

(*t*) *Nordenstrom* v. *Pitt*, 13 M. & W. 723.

(*u*) *Per* Crompton, J., *Fagg* v. *Nudd*, 3 E. & B. 652.

(*w*) Judgm., *Kaye* v. *Dutton*, 7 M. & Gr. 815, and cases there cited.

would be two co-existing promises on one consideration (*x*). It has, however, been said that the cases establishing this proposition may have proceeded on another principle, *viz.*, that the consideration was exhausted by the promise implied by law from the very execution of it, and that, consequently, any promise made afterwards must be *nudum pactum*, there remaining no consideration to support it (*y*). "But the case may perhaps be different where there is a consideration from which *no* promise would be implied by law, that is, where the party suing has sustained a detriment to himself, or conferred a benefit on the defendant, *at his request*, under circumstances which would not raise any implied promise. In such cases it appears to have been held, in some instances, that the act done at the request of the party charged, is a sufficient consideration to render binding a promise afterwards made by him in respect of the act so done (*z*).

Nature of implied promise.

But, however this may be, it is, as previously stated, quite clear, that, where the consideration is past, the promise alleged, even if express, must be identical with that which would have been implied by law from the particular transaction; in other words, "a past and executed consideration will support no other promise than such as may be implied by law" (*a*); thus, in assumpsit, the declaration stated, that, in consideration that plaintiff, at the request of defendant, *had bought* a horse of defendant at a certain price, defendant promised that the horse was *free from vice*, but deceived the plaintiff in this, to wit,

(*x*) *Per* Maule, B., *Hopkins* v. *Logan*, 5 M. & W. 249.

(*y*) See *Deacon* v. *Gridley*, 15 C. B. 295.

(*z*) Judgm., 7 M. & Gr. 816.

(*a*) *Per* Parke, B., *Atkinson* v. *Stephens*, 7 Exch. 572; Judgm., *Earle* v. *Oliver*, 2 Exch. 89; *Lattimore* v. *Garrard*, 1 Exch. 809, 811.

that the said horse was vicious. On motion in arrest of judgment, this declaration was held bad; for the executed consideration, though laid with a request, neither raised by implication of law the promise charged in the declaration, nor would support such promise if express; the Court in this case observing, that the only promise which would result from the consideration, as stated, and be co-extensive with it, would be to deliver the horse upon request (*b*).

In an action against the public officer of an insurance and loan company, the second count of the declaration stated, that it was agreed between the company and the plaintiff, that, from the 1st of January then next, the plaintiff, as the attorney of the said company, should receive a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs for general business; and in consideration that the plaintiff had promised to fulfil the agreement on his part, the company promised to fulfil the same on their part, *and to retain and employ the plaintiff as such attorney* (*c*); the verdict being in favour of the plaintiff, the judgment was afterwards arrested by the Court of Common Pleas, upon this ground, that there was no sufficient consideration to sustain that part of the count above referred to, which alleged a promise to retain and employ the plaintiff, the Court holding that the language of the agreement, as stated, imported an obligation to furnish actual employment to the plaintiff in his profession of an attorney, and that inasmuch as the consideration set forth was in the past, that the plaintiff

(*b*) *Roscorla* v. *Thomas*, 3 Q. B. 234, 237.

(*c*) *Emmens* v. *Elderton*, 4 H. L. Cas. 624; S. C., 13 C. B. 495; 6 *Id.* 160; 4 *Id.* 479; cited *Payne* v. *New South Wales, &c., Steam Nav. Co.*, 10 Exch. 283, 290.

had promised to perform his part of the agreement, such consideration being a past or executed promise, was exhausted by the like promise of the company to perform the agreement, and did not enure as a consideration for the additional part of the promise alleged to retain and employ the plaintiff in the sense before mentioned, as also to perform the agreement. The view thus taken, however, was pronounced erroneous by the Court of Exchequer Chamber, and afterwards by the House of Lords, who held that the averment as to retaining and employing the plaintiff was not to be understood as importing a contract beyond the strict legal effect of the agreement, whence it followed that the mutual promises to perform such agreement laid in the count of the declaration objected to, were a sufficient legal consideration to sustain the defendant's promise (*d*).

Concurrent consideration.

A *concurrent* consideration is where the act of the plaintiff and the promise of the defendant take place at the same time; and here the law does not, as in the case of a bygone transaction, require that, in order to make the promise binding, the plaintiff should have acted at the request of the defendant (*e*); as, where it appeared from the whole declaration taken together, that, at the same moment, by a simultaneous act, a promise was made, that, on the plaintiff's accepting bills drawn by one of the parties then present, the defendants should deliver certain deeds to the plaintiff when the bills were paid, it was held, that a good consideration was disclosed for the defendant's promise (*f*). So, where the promise of the plaintiff and that of the defendant are simul-

(*d*) *Emmens* v. *Elderton, supra.*

(*e*) *Per* Tindal, C.J., 3 Bing., N. C. 715.

(*f*) *Tipper* v. *Bicknell, Id.* 710; *West* v. *Jackson*, 16 Q. B. 280.

taneous, the one may be a good and sufficient consideration for the other (*g*); as where two parties, upon the same occasion, and at the same time, mutually promise to perform a certain agreement not then actually entered into, the consideration moving from the one party is sufficient to support the promise by the other (*h*).

Continuing consideration.

Again, where by one and the same instrument, a sum of money is agreed to be paid by one of the contracting parties, and a conveyance of an estate to be at the same time executed by the other, the payment of the money and the execution of the conveyance may very properly be considered concurrent acts; and, in this case, no action can be maintained by the vendor to recover the money until he executes, or offers to execute a conveyance (*i*). It may, indeed, be stated, generally, that neither party can sue on such an entire contract without showing a performance of, or an offer, or, at least, a readiness and willingness to perform his part of the agreement, or a wrongful discharge or prevention of such performance by the other party; in which latter case the party guilty of the wrongful act shall not, in accordance with a maxim already considered, be allowed to take advantage of it, and thereby to relieve himself from liability for breach of contract (*j*). Whether or not, in any given case, one

(*g*) As to *mutuality* in contracts, see Broom's Com., 5th ed., 307 *et seq.*; *Bealey* v. *Stuart*, 31 L. J., Ex. 281; *Westhead* v. *Sproson*, 6 H. & N. 726; *Whittle*, app., *Frankland*, resp., 2 B. & S. 49.

(*h*) *Thornton* v. *Jenyns*, 1 M. & Gr. 166. See *King* v. *Gillett*, 7 M. & W. 55; *Harrison* v. *Cage*, 1 Ld. Raym. 386; cited *Smith* v. *Woodfine*, 1 C. B. N. S. 667.

(*i*) *Per* Lord Tenterden, C.J., *Spiller* v. *Westlake*, 2 B. & Ad. 157; *Bankart* v. *Bowers*, L. R. 1 C. P. 484.

(*j*) *Ante*, p. 273, *et seq.* "If a party does all he can to perform the act which he has stipulated to do, but is prevented by the wrongful act of the other party, he is in the same situation as if the performance had been perfected:" *per* Holroyd, J.,

promise be the consideration of another, or whether the *performance*, and not the mere promise, be the consideration, must be gathered from, and depends entirely upon, the words and nature of the agreement, and the intention of the contracting parties (*k*).

Continuing consideration.

In addition to cases in which the consideration is concurrent, or is altogether past and executed, others occur wherein the consideration is *continuing* at the time of making the promise; thus, it has been held, that the mere relation of landlord and tenant is a sufficient consideration for the tenant's promise to manage a farm in a husbandlike manner (*l*).

CAVEAT EMPTOR. (*Hob.* 99.)—*Let a purchaser beware.*

Rule of the Roman law.

It seems clear, that, according to the civil law, a warranty of title was, as a general rule, implied on the part of the vendor of land, so that in case of eviction an action for damages lay against him at the suit of the vendee, *sive tota res evincatur, sive pars, habet regressum emptor in venditorem* (*m*); and again, *non dubitatur, etsi specialiter venditor evictionem non promiserit, re evictâ, ex empto competere actionem* (*n*). With us, however, the above proposition does not hold, and it is laid down, that,

and of our common law.

Studdy v. *Sanders*, 5 B. & C. 639; see, also, *Caines* v. *Smith*, 15 M. & W. 189. See notes to *Cutter* v. *Powell*, 2 Sm. L. C.

(*k*) *Thorpe* v. *Thorpe*, 1 Ld. Raym. 662; 1 Salk. 171; *per Cur.*, *Stavers* v. *Curling*, 3 Scott, 750, 754; *per* Williams, J., *Christie* v. *Boulby*, 7 C. B. N. S. 567.

(*l*) *Powley* v. *Walker*, 5 T. R. 373; recognised *Beals* v. *Sanders*, 3 Bing., N. C. 850; *Massey* v. *Goodall*, 17 Q. B. 310.

(*m*) D. 21. 2. 1.

(*n*) C. 8. 45. 6.

"if a man buy lands whereunto another hath title, which the buyer knoweth not, yet ignorance shall not excuse him" (*o*). By the civil law, as observed by Sir E. *Coke*, every man is bound to warrant the thing that he sells or conveys, albeit there be no express warranty; but the common law binds him not, *unless there be a warranty*, either in deed (*p*), or in law; for *Caveat emptor* (*q*) *qui ignorare non debuit quod jus alienum emit* (*r*)—let a purchaser, who ought not to be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution.

Sale of land.—As the maxim *Caveat emptor* applies with certain specific restrictions not only to the quality of, but also to the title to land which is sold, the purchaser is bound to see it, and to inspect the title-deeds at his peril. He does not use common prudence, if he relies on any other security (*s*). The ordinary course, indeed, which is adopted on the sale of real estates is this: the seller submits his title to the inspection of the purchaser, who exercises his own or such other judgment as he confides in, on the goodness of the title (*t*); and if it should turn out to be defective, the purchaser has no remedy, unless he take special covenant or warranty, provided there be no fraud practised on him to induce him to purchase (*u*). Thus, if a regular conveyance is

(*o*) Doct. and Stud., bk. 2, ch. 47.

(*p*) See *Worthington* v. *Warrington*, 5 C. B. 635.

(*q*) Co. Litt. 102. a. "I have always understood that in purchases of land the rule is *Caveat emptor*:" *per* Lawrence, J., *Gwithin* v. *Stone*, 3 Taunt. 439.

(*r*) Hobart, 99.

(*s*) 3 T. R. 56, 65; *Roswell* v. *Vaughan*, Cro. Jac. 196; *per* Holt, C. J., 1 Salk. 211.

(*t*) 37 & 38 Vict. c. 78, s. 1, substitutes 40 for 60 years as a sufficient root of title, and see s. 3 of Conveyancing Act, 1881, 44 & 45 Vict. c. 41.

(*u*) *Per* Lawrence, J., 2 East, 323;

made, containing the usual covenants for securing the buyer against the acts of the seller and his ancestors only, and his title is actually conveyed to the buyer, the rule of *Caveat emptor* applies against the latter, so that he must, at his peril, perfect all that is requisite to his assurance; and, as he might protect his purchase by proper covenants, none can be added (*x*). An administrator found, among the papers of his intestate, a mortgage deed, purporting to convey premises to him, and without arrears of interest. Not knowing it to be a forgery, he assigned it, covenanting, not for good title in the mortgagor, but only that nothing had been done by himself or the deceased mortgagee to encumber the property; and, as this precluded all presumption of any further security, the assignee was held bound to look to the goodness of the title, and failed to recover the purchase-money (*y*). The case of an ordinary mortgage, however, differs from that of a conveyance, because the mortgagor covenants that, at all events, he has a good title (*z*).

Demise land.

In cases respecting the demise of land, any question as to the conditions of the demise must, in the absence of fraud, be determined by considering both the express contract, and likewise the warranty, which may, according to circumstances, either arise by implication of law, or be inferred from the conduct of the parties. Bearing upon this part of our subject, the following cases may

Judgm., *Stephens* v. *De Medina*, 4 Q. B. 428; *per* Erle, C.J., *Thackeray* v. *Wood*, 6 B. & S. 773; *per* Martin, B., *Id.* 775.

(*x*) See Judgm., *Johnson* v. *Johnson*, 3 B. & P. 170; Arg., 3 East, 446; 4 Rep. 26; 5 Rep. 84.

(*y*) *Bree* v. *Holbech*, Dougl. 655; cited 6. T. R. 606; *per* Gibbs, C.J., 1 Marsh. R. 163; *Thackeray* v. *Wood*, 6 B. & S. 766.

(*z*) *Per* Lord Kenyon, C.J., *Cripps* v. *Reade*, 6 T. R. 607.

be mentioned:—In *Sutton* v. *Temple* (*a*), A. agreed, in writing, to take eatage (that is, the use of the herbage to be eaten by cattle) of twenty-four acres of land from B. for seven months, at a rent of 40*l.*, and stocked the land with beasts, several of which died a few days afterwards from the effects of a poisonous substance, which had accidentally been spread over the field without B.'s knowledge. It was held by the Court of Exchequer, that A., nevertheless, continued liable for the whole rent, and was not entitled to throw up the land. In this case it was not suggested that the plaintiff B. had the least knowledge of that which caused the injury when the land was let; but it was contended, that under the above circumstances, there was an implied warranty on the part of the plaintiff that the eatage was wholesome food for cattle; the rule of law was, however, stated to be, that, if a person contract for the use and occupation of land for a specific time, and at a specific rent, he will be bound by his bargain, even though he take it for a particular purpose, and that purpose be not attained. The word "demise," it was observed, certainly does not carry with it any such implied undertaking as that above mentioned; the law merely annexes to it a condition that the party demising has a good title to the premises, and that the lessee shall not be evicted during the term (*b*).

(*a*) 12 M. & W. 52.

(*b*) 12 M. & W. 62, 64. In *Kintrea* v. *Perston*, 1 H. & N. 357, it was held that upon a contract for the sale of an agreement for a lease, it is not an implied condition that the lessor has power to grant the lease. See *Jinks* v. *Edwards*, 11 Exch. 775. A covenant for quiet enjoyment during the term, is implied by law from a demise by parol, but not a covenant for good title; *Bandy* v. *Cartwright*, 8 Exch. 913; followed in *Hall* v. *London Brewery Co.*, 2 B. & S. 742.

In the subsequent case of *Hart* v. *Windsor* (*c*), the Court also held it to be clear, upon the old authorities, that there is no implied warranty on a lease of a house or of land that it is, or shall be, reasonably fit for habitation or cultivation; and still less is there a condition implied by law on the demise of real property only, that it is fit for the purpose for which it is let. "The principles of the common law do not warrant such a position; and though, in the case of a dwelling-house taken for habitation, there is no apparent injustice in inferring a contract of this nature, the same rule must apply to land taken for other purposes,—for building upon, or for cultivation,—and there would be no limit to the inconvenience which would ensue. It is much better to leave the parties in every case to protect their interests themselves by proper stipulations; and, if they really mean a lease to be void by reason of any unfitness in the subject for the purpose intended, they should express that meaning" (*d*). A distinction is, moreover, to be drawn between the preceding cases and *Smith* v. *Marrable* (*e*), where it was held, that in letting a *ready-furnished* house, there *is* an implied condition or obligation that the house is in a fit state to be inhabited, so that a tenant may quit without notice if the premises are unfit for habitation.

Hart v. *Windsor*

Smith v. *Marrable.*

We may add, that the principle laid down in *Hart* v. *Windsor*, above cited, viz., that there is no implied

(*c*) 12 M. & W. 68.

(*d*) Judgm., 12 M. & W. 86, 87, 88. This was an action of debt for rent due under an agreement to let a house and garden-ground with certain fixtures; and the plea alleged that the house was infested with bugs, and was consequently unfit for habitation, and that the defendant accordingly quitted before any part of the rent became due.

(*e*) 11 M. & W. 5. As to this case, see 12 M. & W. 60, 87; and *per* Coltman, J., 7 M. & Gr. 585, and the recent decision in *Wilson* v. *Finch-Hatton*, 46 L. J. Q. B. 489.

warranty on the demise of a house, that it is, or shall be, reasonably fit for habitation, was fully confirmed and acted upon in *Surplice* v. *Farnsworth* (*f*), where it was held, that assumpsit for use and occupation would lie against a tenant who held under a parol agreement, by which the landlord was to do the necessary repairs, and who quitted, because the premises, owing to the landlord's default, were in an untenantable state, although there had not been and could not be any actual beneficial occupation during the period for which the rent was claimed.

Fraud and misrepresentation.

The question of warranty is quite distinct from that of fraud and misrepresentation. It were impossible within the limits of this work to treat fully of these matters. Some remarks connected with them are to be found in another part of this section. For the present we must content ourselves with noticing some of the leading principles to be gathered from the cases relating to the sale of real property, and will refer the student who wishes to exhaust the subject to the leading text-books (*g*).

Definition of fraud.

The fraud used by one who desires to induce another to purchase from him, may consist of a statement false to his knowledge, or of one which he makes recklessly, and of the truth or falsehood of which he is not informed, but which is false in fact, and as to which he is bound in duty to inform himself before he misleads another (*h*).

Remedy for fraud in equity.

Equity will rescind a contract for the sale of land when the purchaser has been misled by the fraudulent misrepresentation of the vendor or his agents. The con-

(*f*) 7 M. & Gr. 576; recognising *Izon* v. *Gorton*, 5 Bing., N. C., 501. See *Keates* v. *Earl of Cadogan*, 10 C. B. 591, cited, *post*.

(*g*) Story, Equity Jurisprudence, § 189 *et seq.*; Dart, Vendors and Purchasers, Chaps. III. and XVIII.; Sugden, Vendors and Purchasers, 14th ed.

(*h*) Story, Eq. Jur., 193; *Pulsford* v. *Richards*, 17 B. 94; *Rawlins* v. *Wickham*, Giff. 355.

tract, however, is not void, but voidable, and if the misrepresentation may be made good, the Court will compel satisfaction, on the petition of the purchaser, without a rescission of the agreement (*i*). In order to entitle the purchaser to such relief, the misrepresentation must, 1stly, be a *fraus dans locum contractui, i.e.*, it must relate to a material fact and operate upon the purchaser's mind as a motive or inducement to enter into the contract (*k*). 2ndly, it must have reference to a subject in respect of which the purchaser is or ought to be regarded by the seller as trusting to the latter. For if the purchaser, choosing to judge for himself, does not avail himself of the knowledge open to him or his agents, he cannot be heard to say, that he was deceived by the vendor's misrepresentation, or induced thereby to enter into the contract, for the rule in such a case is *Caveat emptor* (*l*). 3rdly, the purchaser must have been misled to his prejudice or injury, for courts of equity will not, any more than courts of law, sit for the purpose of enforcing moral obligations, or correcting unconscientious acts, which are followed by no loss or damage (*m*). A purchaser will be entitled to similar relief where the fraud in the vendor has consisted not of *suggestio falsi*,

(*i*) *Ibid.*

(*k*) Story, 195; *Pulsford* v. *Richards, ubi supra;* see *Redgrave* v. *Hurd*, 20 Ch. D. 1; 51 L. J. Ch. 113, and *Smith* v. *Chadwyck*, 20 Ch. D. 27; 51 L. J. Ch. 597, both of which well illustrate the whole doctrine of fraud as affecting the contract of sale.

(*l*) Story, 197, 200; *Attwood* v. *Small*, 6 Cl. & Fin. 232, 233; see *Wilde* v. *Gibson*, 1 H. L. Cas. 605; commented on, Sugd., V. & P., 14th ed., 328-330. It has been said that equity will not "interpose in favour of a man who wilfully was ignorant of that which he ought to have known, —a man who, without exercising that diligence which the law would expect of a reasonable and careful person, committed a mistake, in consequence of which alone the proceedings in court have arisen:" *per* Lord Campbell, *Duke of Beaufort* v. *Neeld*, 12 Cl. & Fin. 248, 286, 522; see, however, *Redgrave* v. *Hurd, supra.*

(*m*) St. 203; *Slim* v. *Croucher*, 1 De G. F. & G. 518; *Fellowes* v. *Gwydyr*, 1 Sim. 63.

but *suppressio veri*. The conditions which have just been noticed must exist also where the fraud has taken the form of concealment, and, moreover, the concealment must be of facts which the seller is bound in conscience and duty to disclose, and in respect of which he cannot be innocently silent, and which the purchaser has a right, not merely *in foro conscientiæ*, but *in foro juridico*, to know (*n*).

Misrepresentation in law in equity.

Not only could the purchaser who had been induced to enter into a contract by fraudulent misrepresentation obtain the relief which has been mentioned in equity, but he might if he chose recover damages in an action for deceit at Common Law. The latter tribunal, however, took no cognizance of an innocent misrepresentation as to the subject-matter of the contract. Courts of Equity, on the other hand, at least since the time of Lord Eldon, have refused to compel specific performance of contracts so tainted, without allowing compensation to the purchaser (*o*). Property may be misdescribed in so material and substantial a manner that there is no place for specific performance. Thus the Court has refused to compel a person who had contracted to purchase copyhold lands, to accept lands which were partly freehold (*p*), nor will a man be forced to accept an underlease instead of an original one (*q*).

Compensation for errors and

It is not uncommon in agreements for the sale of real property to include a stipulation that if any error or mis-

(*n*) Story, 204, 207; *Fox* v. *Mackreth*, 1 Wh. & Tud. L. C.; *Turner* v. *Harvey*, Jac. 178.

(*o*) *Knatchbull* v. *Grueber*, 3 Mer. 146; *Barker* v. *Cox*, 4 Ch. D. 464; 46 L. J. Ch. 62; *Powell* v. *Elliott*, L. R., 10 Ch. App. 424; *McKenzie* v. *Hesketh*, 7 Ch. D. 675; 47 L. J. Ch. 231.

(*p*) *Ayles* v. *Cox*, 16 Beav. 23.

(*q*) *Madeley* v. *Booth*, 2 De G. & S. 718; and see *Peers* v. *Lambert*, 7 Beav. 546; *Perkins* v. *Eds*, 16 Beav. 193.

statement should appear in the particulars of the subject-matter, such error or mis-statement shall not annul the sale or entitle the intending purchaser to be discharged from his purchase, but compensation shall be made him in respect of it. Whether compensation must not be claimed in such a case before the execution of the conveyance and the completion of the contract has recently been the subject of much controversy. The point was argued before *Jessel*, M.R., in *In re Turner and Skelton* (*r*), and it was contended at the Bar that the condition contemplates the case of a misdescription discovered before conveyance, and that after conveyance, the condition is merged in the conveyance. The M.R., however, held that there was no reason why a right admitted to exist up to the time of conveyance, should then cease, and in this followed the judgment of the Exchequer in *Bos* v. *Helsham* (*s*). He went much further, however, in saying that this right to compensation exists independently of any special condition. In *Manson* v. *Thacker* (*t*), *Malins*, V.-C., had refused to follow *Bos* v. *Helsham*, and decided that the condition for compensation is inoperative after conveyance; and when the question again came before him in *Allen* v. *Richardson* (*u*), he expressed his dissent from the judgment in *Re Turner and Skelton*, and declined to follow it. It would appear that the principal ground upon which the Vice-Chancellor based his judgment on this question was the necessity of preventing the flood of litigation which in his opinion would result from any other view being adopted by the

misstatements.

(*r*) 13 Ch. D. 130; 49 L. J. Ch. 114; 41 L. T. 668; 28 W. R. 312.

(*s*) L. R. 2 Ex. 72.

(*t*) 7 Ch. D. 620; 47 L. J. Ch. 312; 38 L. T. 209; 26 W. R. 604.

(*u*) 13 Ch. D. 524; 49 L. J. Ch. 137; 41 L. T. 614; 28 W. R. 313.

Court. The case of *Hart* v. *Swaine* (*x*), decided by *Fry*, J., has been treated as supporting the view of *Jessel*, M.R., but it is conceived that it cannot properly be so considered, for in that case *Fry*, J., held that the plaintiff had made out a case of so-called *legal fraud*. The authorities on this subject are all collated and reviewed, in the case of *Jolliffe* v. *Baker* (*y*), by *Watkyn Williams*, J., who expressed his agreement with the view of *Malins*, V.-C., and held that after completion of the contract compensation could not be recovered unless there had been fraud or the breach of some contract or warranty contained in the conveyance. In this last case there was not a special condition providing for compensatation as there was in the subsequent case of *Palmer* v. *Johnson* (*z*), in which the decisions of *Jessel*, M.R., and the Court of Exchequer above noticed were followed, and those of *Malins*, V.-C., and *Watkyn Williams*, J., dissented from, although it was stated that in *Jolliffe* v. *Baker* the plaintiff was not entitled to recover, as his action sounded in damages for misrepresentation, and he had no contract under which he was entitled to compensation. We may here point out that in Courts of Equity as of law wilful *deceit* must accompany a misrepresentation in order to entitle a person to relief in the nature of damages (*a*). The doctrine of *Jessel*, M.R., that independently of special conditions, a purchaser who has been misled by an innocent misrepresentation may before or after conveyance recover compensation, might at first sight seem to conflict with this last-mentioned principle. It is conceived, however, that the theory of

(*x*) 7 Ch. D. 42; 47 L. J. Ch. 5.

(*y*) 11 Q. B. D. 255; 52 L. J. Q. B. 609.

(*z*) 12 Q. B. D. 32.

(*a*) *Redgrave* v. *Hurd*, 20 Ch. D. 27; *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 145.

such compensation is rather of a rebate of purchase-money accorded to one who has not got all that he contracted to buy. Regarded in that light, the doctrine of the late M.R. is not only consonant to justice, but also to well-known principles of the Common Law.

Sale of goods.

Where goods are bought and sold, it has generally been received as the doctrine of English law that the maxim *Caveat emptor* applies as respects both title and quality, and that the purchaser takes all risk of defect in either of these respects upon himself (*b*), unless there are some circumstances beyond the mere fact of sale from which a warranty may be implied (*c*). It will be seen hereafter that this proposition as regards warranty of *title* in the sale of personal chattels has been questioned by a modern writer of great authority (*d*). We shall, before concluding this section, deal with the question of title. The following remarks have reference principally to the question of warranty in respect of the *quality* of goods. It is beyond all doubt that, by the general rules of law, there is no warranty of quality arising from the bare contract of sale of goods (*e*). As we shall shortly see, many of the sales effected in every-day life are accompanied by circumstances which in law give rise to *implied warranty*. Before considering, however, the limitation of the rule

(*b*) *Morley* v. *Attenborough*, 3 Ex. 500, where the authorities are reviewed by Parke, B., and see Chitty on Contr. 413 (11th ed.); Leake, Dig. of Contr. 402; 2 Taylor on Evidence, 984; Bullen and Leake, Prec. 342 (ed. 1882).

(*c*) Judgm., *Hall* v. *Conder*, 2 C. B. N. S. 40, recognising *Morley* v. *Attenborough*, 3 Exch. 500.

(*d*) Mr. Benjamin: see his work, pp. 620–31, *et postea*, p. 759.

(*e*) *Springwell* v. *Callen*, Alleyn 91, and 2 East, 448 n.; *Parkinson* v. *Lee*, 2 East, 314; *Williamson* v. *Allinson*, 2 East, 446; *Early* v. *Garrett*, 9 B. & C. 902; *Morley* v. *Attenborough*, 3 Ex. 500; *Ormrod* v. *Huth*, 14 M. & W. 664; *Hall* v. *Conder*, 2 C. B. N. S. 22; *Hopkins* v. *Tanqueray*, 15 C. B. 130.

Caveat emptor effected by implied warranty, it will be well to deal briefly with the other cases in which the application of the maxim is excluded, which are—1st, sales by description; 2nd, sales by sample; 3rd, sales accompanied with an express warranty.

Description.

1st. Where goods, whether specific or unspecific, are sold with a particular description, it is a condition precedent to the vendee's liability upon the contract that the description should be fulfilled. There has been much confusion between description and warranty. They are clearly distinguished by Lord *Abinger* in *Chanter* v. *Hopkins*(*f*) "A warranty is an express or implied statement of something which a party undertakes shall be part of a contract, and though part of the contract, *collateral to the express object of it.* But in many of the cases the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the breach of such a contract a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil, as if a man offers to buy peas of another and he sends him beans, he does not perform his contract; but that is not a warranty; there is no *warranty* that he should sell him peas; the *contract* is to sell peas, and if he sell him anything else in their stead, it is a non-performance of the contract." The importance of this distinction will be recognised when it is borne in mind that if the description is not satisfied, goods may be entirely rejected, and the purchase money

(*f*) 4 M. & W. 399. See *Bowes* v. *Shand*, 2 App. Cas. 480. At p. 571 Lord Blackburn uses the word *warranty* in conjunction with *condition*. See judgment of Williams, J., in *Behn* v. *Burness*, 3 B. & S. 751; 32 L. J. Q. B. 204, Ex.

The judgment of Parke, B., in *Barr* v. *Gibson*, 3 M. & W. 390, is the leading authority on description in the case of a specific chattel.

recovered if already paid (*g*). As we shall see, a purchaser is not put in so favourable a position by a mere breach of warranty.

Sale by sample.

2nd. In a sale by sample it is an implied condition that the buyer shall have an opportunity of comparing the bulk with the sample, and if this is not complied with he is entitled to reject the goods (*h*). If the bulk does not correspond with the sample, the buyer is not bound to accept the goods, nor is he bound to return them, but he must give notice to the seller within a reasonable time that he refuses to accept (*i*). If the time of inspection as agreed on be subsequent to the delivery, the buyer may reject after delivery (*k*). Notwithstanding this right to inspect and reject, the property in the goods, however inferior to sample, passes by the contract, which may be completed by delivery and acceptance; and if the buyer neglect to give notice of his intention to reject within a reasonable time, that course is no longer open to him, and his only remedy is to seek compensation, as upon a breach of warranty (*l*).

Warranty.

3rd. A warranty is well defined by Lord *Abinger* in the passage cited a little while back (*m*). It is a collateral undertaking, forming part of the contract by the agreement of the parties (*n*).

(*g*) Benj. Sales, 3rd ed., 596.

(*h*) *Lorymer* v. *Hickson*, 1 B. & C. 1.

As to what constitutes a sale by sample, see Benj., 3rd ed., 636–8.

(*i*) *Couston* v. *Chapman*, L. R. 2 Sc. App. 250; *per* Lord Chelmsford.

(*k*) *Per* Brett, J., *Heilbutt* v. *Hickson*, L. R. 7 C. P. 438, at p. 456; *Grimoldby* v. *Wells*, L. R. 10 C. P. 391, at p. 395; 44 L. J. C. P. 203; 32 L. T. 490; 41 L. J. C. P. 228; 27 L. T. 336; 20 W. R. 1005.

(*l*) *Heilbutt* v. *Hickson*, *per* Bovill, C.J.

(*m*) *Ante*, p. 734.

(*n*) *Foster* v. *Smith*, 18 C. B. 156; *Mondel* v. *Steel*, 8 M. & W. 858; *Street* v. *Blay*, 2 B. & Ad. 456; *Chanter* v. *Hopkins*, 4 M. & W. 399.

Express or implied.

A warranty may arise either from an express undertaking on the part of the seller, or it may be implied by law from the circumstances attending the contract of sale. No special form of words is required to constitute a warranty. A representation made by way of inducement to the buyer to enter into the contract is not a warranty, but any statement relating to the subject-matter of the contract, and made during the course of dealing may be (*o*). *Buller*, J., in defining warranty in the leading case of *Pasley* v. *Freeman* said, "It was rightly laid down by *Holt*, C.J., and has been uniformly adopted ever since, that an affirmation at the time of sale is a warranty, provided it appears in evidence to have been so intended" (*p*). Where the vendor assumes to assert a *fact* of which the buyer is ignorant, he will be taken to have intended a warranty; not so if he only gives an opinion or judgment upon a matter of which he has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment (*q*).

Express warranty.

A vendor is not fixed with a warranty because he affirms that the thing sold has not a defect, which is a visible one, and obvious to the senses, the rule, *Caveat emptor*, is without doubt applicable—*Ea quæ commendandi causâ in venditionibus dicuntur, si palam appareant, venditorem non obligant* (*r*). It is, indeed, laid down by the older authorities, that defects, apparent at the time of a bargain, are not included in a warranty (*s*),

(*o*) Benj., 3rd ed., 605, where many illustrations are given.

(*p*) 3 T. R., at p. 57; 2 Sm. L. C. p. 66 (ed. 1879).

(*q*) *Per* Buller, J., in *Pasley* v. *Freeman*, 3 T. R. 51; *Powell* v. *Barham*, 4 A. & E. 473; *Jendwine* v. *Slade*, 2 Esp. 572; *Stuckley* v. *Bailey*, 1 H. & C. 405; *Carter* v. *Crick*, 4 H. & N. 412; *Carmac* v. *Warriner*, 1 C. B. 356.

(*r*) D. 18. 1. 43. pr.

(*s*) See, as to warranty, *Bartholomew* v. *Bushnell*, 20 Day (U. S.), R. 271; *post*.

however general, because they can form no subject of deceit or fraud; and, originally, the mode of proceeding for breach of warranty was by an action of deceit, grounded on a supposed fraud; and it may be presumed that there can be no deceit where a defect is so manifest that both parties discuss it at the time of the bargain. A party, therefore, who should buy a horse, *knowing* it to be blind in both eyes, could not sue on a general warranty of soundness (*t*). However, if without such knowledge on the part of the purchaser, a horse is warranted sound, which, in reality, wants the sight of an eye, though this seems to be the object of one's senses, yet, as the discernment of such defects is frequently matter of skill, it has been held, that an action lies to recover damages for this imposition (*u*).

Moreover, it is to be remarked that a warranty will not necessarily result from a simple commendation of the quality of goods by the vendor; for in this case the rule of the civil law—*Simplex commendatio non obligat* (*x*)—has been adopted by our own, and such *simplex commendatio* will, in most cases be regarded merely as an invitation to custom, since every vendor will naturally affirm that his own wares are good (*y*), unless it appear on the evidence, or from the words used, that the affirmation at the time

(*t*) *Per* Tindal, C.J., *Margetson* v. *Wright*, 7 Bing. 605. See *Liddard* v. *Kain*, 2 Bing. 183; *Holliday* v. *Morgan*, 1 E. & E. 1.

(*u*) *Butterfeilds* v. *Burroughs*, 1 Salk. 211; *Holliday* v. *Morgan*, 1 E. & E. 1.

(*x*) D. 4. 3. 37; *per* Byles, J., 17 C. B. N. S. 597.

(*y*) See, *per* Sir Jas. Mansfield, C.J., *Vernon* v. *Keyes*, 4 Taunt. 488, 493; Arg., *West* v. *Jackson*, 16 Q. B. 282, 283; *Chandelor* v. *Lopus*, Cro. Jac. 4. A. bought a waggon at sight of B., which B. affirmed to be worth much more than its real value; Held that no action would lie against B. for the false affirmation, there being no express warranty nor any evidence of fraud: *Davis* v. *Meeker*, 5 Johns. (U. S.) R. 354.

of sale was intended to be a warranty, or that such must be its necessary meaning (*z*): it is, therefore, laid down, that in a purchase without warranty, a man's eyes, tastes, and senses must be his protection (*a*); and that where the subject of the affirmation is mere matter of opinion (*b*), and the vendee may himself institute inquiries into the truth of the assertion, the affirmation must be considered a "nude assertion," and it is the vendee's fault from his own laches that he is deceived (*c*). Either party may, therefore, be innocently silent as to grounds open to both to exercise their judgment upon; and in this case, *Aliud est celare, aliud tacere*—silence is by no means equivalent to concealment (*d*).

Implied warranty of quality.

With regard to implied warranty of *quality*, the following general rule was laid down by *Tindal*, C.J.: "If a man purchase goods of a tradesman, without, in any way, relying upon the skill and judgment of the vendor,

(*z*) *Per* Buller, J., 3 T. R. 57; *Allan* v. *Lake*, 18 Q. B. 560; *Jones* v. *Clark*, 27 L. J., Ex., 165; *Vernede* v. *Weber*, 1 H. & N. 311; *Simond* v. *Braddon*, 2 C. B. N. S. 321; *Shepherd* v. *Kain*, 5 B. & Ald. 240; *Freeman* v. *Baker*, 5 B. & Ad. 797; *Budd* v. *Fairmaner*, 8 Bing. 52; *Coverley* v. *Burrell*, 5 B. & Ald. 257.

(*a*) Fitz., Nat. Brev., 94; 1 Roll. Abr. 96.

(*b*) See *Power* v. *Barham*, 4 A. & E. 473; *Jendwine* v. *Slade*, 2 Esp., N. P. C., 572.

(*c*) *Per* Grose, J., 3 T. R. 54, 55; *Bayley* v. *Merrel*, Cro. Jac. 386; S. C., 3 Bulstr. 94; cited and distinguished in *Brass* v. *Maitland*, 6 E. & B. 470; *Risney* v. *Selby*, 1 Salk. 211; S. C., 2 Ld. Raym. 1118; recognised *Dobell* v. *Stevens*, 3 B. & C. 625; *per* Tindal, C.J., *Shrewsbury* v. *Blount*, 2 Scott, N. R., 594. See *Price* v. *Macaulay*, 2 De G., M. & G. 339.

(*d*) *Per* Lord Mansfield, C.J., 3 Burr. 1910; cited, *per* Best, C.J., 3 Bing. 77; Arg., *Jones* v. *Bowden*, 4 Taunt. 851. See *Laidlaw* v. *Organ*, 2 Wheaton (U. S.), R. 178; Arg., 9 *Id.* 631, 632; *per* Abbott, C.J., *Bowring* v. *Stevens*, 2 C. & P. 341.

As to what will constitute fraudulent concealment in the view of a court of equity, see *Central R. C. of Venezuela* v. *Kisch*, L. R. 2 H. L. 99. By such court the maxim, *Qui vult decipi decipiatur*, is recognised; see *Reynell* v. *Sprye*, 1 De G., M. & G. 687, 710.

the latter is not responsible for their turning out contrary to his expectations; but, if the tradesman be informed at the time the order is given of the purpose for which the article is wanted, the buyer relying upon the seller's judgment, the latter impliedly warrants that the thing furnished shall be reasonably fit and proper for the purpose for which it is required" (*e*). Accordingly, where an agreement is for a specific chattel in its *then state*, there is no implied warranty of its fitness or merchantable quality (*f*); but if a person is employed to *make* a specific chattel, there the law implies a contract on his part that it shall be fit for the purpose for which it is ordinarily used (*g*). And upon a sale not by sample, and without warranty, of merchandise, which the buyer has no opportunity of inspecting, a condition that the article shall fairly and reasonably answer the description in the contract is implied (*h*), and it has been held, that

(*e*) *Brown* v. *Edgington*, 2 Scott, N. R., 504; recognised *per* Parke, B., 12 M. & W. 64; *Jones* v. *Bright*, 5 Bing. 533; recognised 4 M. & W. 406; *per* Abbott, C.J., *Gray* v. *Cox*, 4 B. & C. 108, 115; *Wright* v. *Crookes*, 1 Scott, N. R., 685.

(*f*) *Parkinson* v *Lee*, 2 East, 314; recognised 8 Bing. 52, and 12 M. & W. 64; *Chanter* v. *Hopkins*, 4 M. & W. 399; *Laing* v. *Fidgeon*, 6 Taunt. 108; *Power* v. *Barham*, 4 A. & E. 473.

(*g*) *Shepherd* v. *Pybus*, 3 M. & Gr. 868; *Camac* v. *Warriner*, 1 C. B. 356; *Street* v. *Blay*, 2 B. & Ad. 456; *Kennedy* v. *Panama, &c., Mail Co.*, L. R. 2 Q. B. 587, 588; *Keele* v. *Wheeler*, 7 M. & Gr. 663.

(*h*) *Miles* v. *Schilizzi*, 17 C. B. 619. See *Bull* v. *Robinson*, 10 Exch. 342, 345; Judgm., *Bigge* v. *Parkinson*, 7 H. & N. 961; Judgm., *Emmerton* v. *Mathewe*, *Id.* 593; *Lamert* v. *Heath*, 15 M. & W. 486 (in connection with which case see *Westropp* v. *Solomon*, 8 C. B. 345); *Hall* v. *Conder*, 2 C. B. N. S. 22, 40, 42; *Smith* v. *Neale*, *Id.* 67, 89; *Smith* v. *Scott*, 6 C. B. N. S. 771, 780, 782; *Hopkins* v. *Hitchcock*, 14 C. B. N. S. 65; *Josling* v. *Kingsford*, 13 C. B. N. S. 447; *Lawes* v. *Purser*, 6 E. & B. 930. See *Mitchell* v. *Newhall*, 15 M. & W. 308; *Chanter* v. *Dewhurst*, 12 M. & W. 823; *Taylor* v. *Stray*, 2 C. B. N. S. 175, cited in *Cropper* v. *Cook*, L. R. 3 C. P. 198, and *Whitehead* v. *Izod*, L. R. 2 C. P. 238.

the vendor of the bill of exchange impliedly warrants that it is of the kind and description which on the face of it it purports to be (*i*).

The circumstances which give rise to an implied warranty of quality, and exclude the principle of *Caveat emptor* are considered, and all the authorities bearing on the subject classified in the case of *Jones* v. *Just* (*k*), and the cases bearing upon the subject were there classified as under:—

1st.—Where goods are *in esse* and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *Caveat emptor* applies, even though the defect which exists in them is latent and not discoverable on examination, at least where the seller is neither the grower nor the manufacturer (*l*). The buyer in such a case has the opportunity of exercising his judgment upon the matter;, and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may if he chooses require a warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable.

2ndly.—Where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty (*m*).

3rdly.—Where a known described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still

(*i*) *Gompertz* v. *Bartlett*, 2 E. & B. 849 (recognising *Jones* v. *Ryde*, 5 Taunt. 488; and *Young* v. *Cole*, 3 Bing., N. C., 724); *Pooley* v. *Brown*, 11 C. B. N. S. 566; *Gurney* v. *Womersley*, 4 E. & B. 133.

(*k*) L. R. 3 Q. B. 197.

(*l*) *Parkinson* v. *Lee*, 2 East, 314, cited, Judgm., *Mody* v. *Gregson*, L. R. 4 Ex. 54.

(*m*) *Barr* v. *Gibson*, 3 M. & W. 390.

if the known, described, and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer (*n*).

4thly.—Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied (*o*). In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment.

5thly.—Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article (*p*).

6thly.—If, therefore, it must be taken as established that on the sale of goods by a manufacturer or dealer to be applied to a particular purpose, it is a term in the contract that they shall reasonably answer that purpose, and on the sale of an article by a manufacturer to a vendee who has not had the opportunity of inspecting it during the manufacture that it shall be reasonably fit for use, or shall be merchantable as the case may be, it seems to follow that a similar term is to be implied on a sale by a

(*n*) *Chanter* v. *Hopkins*, 4 M. & W. 399; *Ollivant* v. *Bayley*, 5 Q. B. 288. See *Mallan* v. *Radloff*, 17 C. B. N. S. 588.

(*o*) *Brown* v. *Edgington*, 2 M. & Gr. 279; and *Jones* v. *Bright*, 5 Bing. 533; as to which cases see *per* Lush, J., *Readhead* v. *Midland R. C.*, L. R. 2 Q. B. 418, 419, 428; S. C., 4 *Id.* 379 (distinguished in *Francis* v. *Cockrell*, L. R. 5 Q. B. 184); *Macfarlane* v. *Taylor*, L. R. 1 Sc. App. Cas. 245.

(*p*) *Laing* v. *Fidgeon*, 4 Camp. 169; 6 Taunt. 108; *Shepherd* v. *Pybus*, 3 M. & Gr. 868.

merchant to a merchant or dealer who has had *no* opportunity of inspection (*q*); and in the judgment from which the foregoing remarks have been extracted the proposition is thus stated that "in every contract to supply goods of a specified description which the buyer has had no opportunity to inspect, the goods must not only in fact answer the specific description, but must also be saleable or merchantable under that description" (*r*); and the maxim *Caveat emptor* consequently does not apply.

It seems established law that victuallers, brewers, and other common dealers in victuals, who, in the ordinary course of their trade, sell provisions unfit to be the food of man, are civilly liable to the vendee, without proof of fraud on their part, and in the absence of any express warranty of the soundness of the thing sold; though such liability would not attach to a private person, not following any of the above trades, who sells an unwholesome article for food (*s*). And a salesman offering for sale a carcase with a defect of which he is not only ignorant but has not any means of knowledge (the defect being latent), does not as a matter of law impliedly warrant that the carcase is fit for human food, and is not bound to refund the price should it turn out not to be so (*t*).

It will be collected, from what has been already stated, that

(*q*) *Bigge* v. *Parkinson*, 7 H. & N. 955.

(*r*) Judgm., *Jones* v. *Just*, L. R. 3 Q. B. 205; approved in judgm., *Mody* v. *Gregson*, L. R. 4 Ex. 52.

(*s*) *Burnby* v. *Bollett*, 16 M. & W. 644, and authorities there cited.

(*t*) *Emmerton* v. *Mathews*, 7 H. & N. 586; cited, judgm., *Jones* v. *Just*, L. R. 3 Q. B. 202. See 23 & 24 Vict. c. 84; *Smith* v. *Baker*, 40 L. T. 261; *Ward* v. *Hobbs*, 4 App. Cas. 13; 48 L. J. Q. B. 281; 40 L. T. 73; 27 W. R. 114. But there is a warranty that meat will keep until reaching the journey's end. *Beer* v. *Walker*, 46 L. J. C. P. 677.

the vendor of a chattel may in all cases expressly limit his esponsibility in respect of the quality of the thing sold, or, in other words, he may, by express stipulation, exclude that contract which the law would otherwise have implied; and, referring the reader to the remarks heretofore made and authorities cited as to this point (*u*).

Effect of fraud.

We have already, in noticing the maxim as to *dolus malus* (*x*), had occasion to observe generally the effect of *fraud* in vitiating every kind of contract, and, certainly, the remarks then made apply with peculiar force to the contract of sale; for not only may such contract, before its completion, be repudiated on the ground of fraud, but, if the price of the goods sold has been actually paid, an action on the case will lie at suit of the purchaser to recover damages from the vendor. "If," it has been said in a case already cited (*y*), "two parties enter into a contract, and if one of them, for the purpose of inducing the other to contract with him, shall state that which is not true in point of fact, *which he knew at the time he stated it not to be true*, and if, upon that statement of what is not true, and what is known by the party making it to be false, this contract is entered into by the other party, then, generally speaking, and unless there is more than that in the case, there will be at law an action open to the party entering into such contract, an action of damages grounded upon the deceit; and there will be a relief in equity to the same party to escape from the contract which he has so been inveigled into making by the false representation of the other contracting party."

False representation.

(*u*) See *Sharp* v. *The Great Western R. C.*, 9 M. & W. 7.

(*x*) *Ante*, p. 684.

(*y*) *Attwood* v. *Small*, 6 Cl. & Fin. 444; *per* Lord Chelmsford, C., *Central R. C. of Venezuela* v. *Kisch*, L. R. 2 H. L. 121.

"Fraud gives a cause of action if it leads to any sort of damage; it avoids contracts only where it is the ground of the contract, and where, unless it had been employed, the contract would never have been made" (*z*).

In the common law reports, accordingly, many cases are to be found, of which *Pasley* v. *Freeman* (*a*) is usually cited as the leading decision, which sufficiently establish that a false affirmation made by the defendant, with intent to defraud the plaintiff, whereby the plaintiff receives damage, will lay the ground of an action upon the case in the nature of deceit; and this proposition may, in fact, be considered as included in one yet more general, *viz.*, that where there is fraud, or breach of duty and damage, the result of such fraud or breach of duty, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of that fraud or negligence is responsible to the party injured (*b*). Therefore, where A. sold a gun, with a fraudulent warranty to B. for the use of C. to whom such warranty was either directly or indirectly communicated, and who was injured by the bursting of the gun; it was held, that A. was liable to B. on the warranty, by reason of the privity of contract, and to C. for the injury resulting from the false representation (*c*). And a chemist

(*z*) *Per* Lord Wensleydale, *Smith* v. *Kay*, 7 H. L. Cas. 775–6; citing *Small* v. *Attwood*, 6 Cl. & F. 232.

"Contemporaneous fraudulent statements avoid the contract;" *per* Byles, J., *Hotson* v. *Browne*, 9 C. B. N. S. 445.

(*a*) 3 T. R. 51; Com. Dig., "*Action upon the Case for a Deceit*," (A. 1); *Moens* v. *Heyworth*, 10 M. & W. 147; *Murray* v. *Mann*, 2 Exch. 538. See *Pontifex* v. *Bignold*, 3 Scott, N. R., 390.

(*b*) Judgm., *Langridge* v. *Levy*, 2 M. & W. 532; S. C. (affirmed in error), 4 M. & W. 337; *George* v. *Skivington*, L. R. 5 Ex. 1; *Pilmore* v. *Hood*, 5 Bing., N. C., 97; *Taylor* v. *Ashton*, 11 M. & W. 401. See *Mummery* v. *Paul*, 1 C. B. 316.

(*c*) *Langridge* v. *Levy*, 2 M. & W. 519, 529, 532; S. C., 4 *Id.* 337

compounding an article sold for a particular purpose, and knowing of the purpose for which it is bought, will be liable to an action on the case for unskilfulness and negligence in the manufacture of it causing damage to the person using it, and for whose use the chemist knew that it was meant (*d*).

In order, however, to entitle a person to recover for damage sustained in consequence of misrepresentation, it must appear that the communication, or false affirmation, which occasioned the damage, was made *wilfully*. Where a party, who is applied to for his opinion, gives an honest, although mistaken, one, it is all that can be expected: it is not enough to show that the representation is false, and that it turned out to be altogether unfounded, if the party making it acted upon a fair and reasonably well-grounded belief that it was true (*e*).

Tacit assent.

It must, however, be observed, that there may be a fraudulent representation sufficient to avoid a contract, or to form the ground of an action, without actual active declaration from the party contracting: there may be a sort of tacit acquiescence in a representation fraudulent within the party's knowledge, or in the communication of a falsehood by a third person, originally flowing from him-

(explained *per* Maule, J., *Howard* v. *Shepherd*, 9 C. B. 312; and *per* Willes, J., *Collis* v. *Selden*, L. R. 3 C. P. 498, and approved in *Alton* v. *Midland R. C.* 19 C. B. N. S. 239, 245); *Eastwood* v. *Bain*, 3 H. & N. 738; *Farrant* v. *Barnes*, 11 C. B. N. S. 553; *Winterbottom* v. *Wright*, 10 M. & W. 109; *Priestley* v. *Fowler*, 3 M. & W. 1; *Blakemore* v. *Bristol and Exeter R. C.*, 8 E. & B. 1035, and cases cited *post*.

(*d*) *George* v. *Skivington*, L. R. 5 Ex. 1.

(*e*) *Haycraft* v. *Creasy*, 2 East, 92; cited, *Adamson* v. *Jarvis*, 4 Bing. 73, 74; *Shrewsbury* v. *Blount*, 2 Scott, N. R., 588; *per* Parke, B., 11 M. & W. 413. In connection with this subject, see, also, *Longmeid* v. *Holliday*, 6 Exch. 761, 766; cited in *Francis* v. *Cockrell*, L. R. 5 Q. B. 194; *Gerhard* v. *Bates*, 2 E. & B. 476.

self (*f*). In cases belonging to this class, a maxim applies, which is well known and admitted to be correct in many of the ordinary occurrences of life—*Qui tacet consentire videtur* (*g*)—silence implies consent (*h*); and such consent may be inferred from the party's subsequent conduct (*i*). For instance, defendant, being about to sell a public-house, falsely represented to B., who had agreed to purchase, that the receipts were £180 per month, and B., to the knowledge of defendant, communicated this representation to plaintiff, who became the purchaser instead of B.; it was held, that an action lay against defendant at suit of the plaintiff, who had sustained damage in consequence of having acted on the representation (*k*).

There is, however, no implied duty cast on the owner of a house being in a ruinous and unsafe condition to inform a proposed tenant that it is unfit for habitation, nor will an action of deceit lie against him for omitting to disclose the fact (*l*).

Distinction between warranty and representation.

The distinction between a warranty and a representation which has already been adverted to (*m*), may be stated as follows; a warranty forms a part of the contract, but a

(*f*) See *per* Coltman, J., 5 Bing. N. C. 109; *Wright* v. *Crookes*, 1 Scott, N. R., 685.

(*g*) Jenk. Cent. 32. See, in illustration of this maxim, *Morrish* v. *Murrey*, 13 M. & W. 52; *Lucy* v. *Mouflet*, 5 H. & N. 229; *Cooper* v. *Law*, 6 C. B. N. S. 502, 508; *Morgan* v. *Evans*, 3 Cl. & Fin. 205; *Marq. of Salisbury* v. *Great Northern R. C.*, 5 C. B. N. S. 174.

(*h*) For instance, "where there is a duty to speak, and the party does not, an assent may be inferred from his silence:" *per* Bramwell, B., 4 H. & N. 798.

(*i*) Jenk. Cent. 32, 68, 226; *Hunsden* v. *Cheney*, 2 Vern. 150, offers an illustration of this maxim. See, also, 2 Inst. 305; *Richardson* v. *Dunn*, 2 Q. B. 218; *Wright* v. *Crookes*, 1 Scott, N. R., 685.

(*k*) *Pilmore* v. *Hood*, 5 Bing. N. C. 97. See *Dobell* v. *Stevens*, 3 B. & C. 623.

(*l*) *Keates* v. *Earl of Cadogan*, 10 C. B. 591; distinguishing *Hill* v. *Gray*, 1 Stark. N. P. C. 434, as containing the element of "aggressive deceit."

(*m*) *Ante*, pp. 734, 5, 6.

representation may be altogether collateral to the contract, and not incorporated with it (*n*). If, indeed, the representation be of a fact, without which the other party would not have entered into the contract at all (*o*), or at least on the same terms, it may, if untrue, avoid the contract, or give a right to sue for damages on the ground of fraud (*p*).

It is further material to observe, with reference to the distinction between an action upon the case for a false representation and one purely *ex contractu* upon a warranty, that, to support the former, three circumstances must combine: 1st, it must appear that the representation was contrary to the fact; 2ndly, that the party making it knew it to be contrary to the fact; and, 3rdly, that it was the false representation which gave rise to the contracting of the other party (*q*).

In the latter case above specified, *viz.*, that of an action *ex contractu* for breach of warranty, it is not necessary that all those three circumstances should concur, in order

(*n*) Hence the main question in the cause may be—what was the real contract between the parties? See, for instance, *Foster* v. *Smith*, 1 H. & N. 156. And if verbal stipulations are afterwards embodied in a written contract, the parties will of course be bound by *that* alone, subject to be interpreted by the usages of trade: *Harnor* v. *Groves*, 15 C. B. 667, 674. As illustrating the difference between a warranty and a description, collateral representation or mere expression of an opinion or intention, see *Cranston* v. *Marshall*, 5 Exch. 395; *Taylor* v. *Bullen*, *Id.* 779; *Hopkins* v. *Tanqueray*, 15 C. B. 130; with which compare *Percival* v. *Oldacre*, 18 C. B. N. S. 398; *Stucley* v. *Baily*, 1 H. & C. 405; *Benham* v. *United Guarantee, &c., Co.*, 7 Exch. 744; *Barker* v. *Windle*, 6 E. & B. 675; *Gorrissen* v. *Perrin*, 2 C. B. N. S. 681, and cases there cited.

(*o*) *Bannerman* v. *White*, 10 C. B. N. S. 844.

(*p*) See, *per* Lord Abinger, C.B., 6 M. & W. 378; *per* Parke, B., *Id.*, 373; *Pickering* v. *Dowson*, 4 Taunt. 779, 786; cited *Kain* v. *Old*, 2 B. & C. 634; *Mummery* v. *Paul*, 1 C. B. 316; *Pilmore* v. *Hood*, 5 Bing., N.C., 97.

(*q*) *Per* Lord Brougham, *Attwood* v. *Small*, 6 Cl. & Fin. 444, 445; *Milne* v. *Marwood*, 15 C. B. 778; *Behn* v. *Kemble*, 7 C. B. N. S. 260.

to ground an action for damages at law or a claim for relief in a court of equity: for where a warranty is given, by which the party undertakes that the article sold shall, in point of fact, be such as it is described, no question can be raised upon the *scienter*, upon the fraud or wilful misrepresentation (*r*).

Case for deceit.

With respect to an action upon the case for false representation, although fraud and an intent to deceive the plaintiff are imputed in the declaration to the defendant, and although it is expressly laid down, that "fraud and falsehood must concur to sustain this action" (*s*), yet the law will *infer* an improper motive, if what the defendant says *is false within his own knowledge* and is the occasion of damage to the plaintiff (*t*). In *Polhill* v. *Walter* (*u*), a bill was presented for acceptance at the office of the drawee, who was absent. A., who lived in the same house with the drawee, being assured by one of the payees that the bill was perfectly regular, was induced to write on the bill an acceptance, as by the procuration of the drawee, believing that the acceptance would be sanctioned, and the bill paid by the latter. The bill was dishonoured when due, and the indorsee having, on proof of the above facts, been non-suited in an action against the drawee, sued A. for falsely, fraudulently, and deceit-

(*r*) 6 Cl. & Fin. 444, 445.

(*s*) *Per* Gibbs, C.J., *Ashlin* v. *White*, Holt, N. P. C. 387.

(*t*) *Per* Tindal, C.J., *Foster* v. *Charles*, 6 Bing. 483; S. C., 7 Bing. 105; *Murray* v. *Mann*, 2 Exch. 538; *Gerhard* v. *Bates*, 2 E. & B. 476, 491; *Tatton* v. *Wade*, 18 C. B. 371; *Thom* v. *Bigland*, 8 Exch. 725; *Randell* v. *Trimen*, 18 C. B. 786; *per* Lord Campbell, C.J., *Wilde* v. *Gibson*, 1 H. L. Cas. 633; see *Crawshay* v. *Thompson*, 5 Scott, N. R., 562; *Rodgers* v. *Nowill*, 5 C. B. 109.

(*u*) 3 B. & Ad. 114; cided *Smout* v. *Ilbery*, 10 M. & W. 10: and 5 Scott, N. R., 596, 599; and *per* Parke, B., 2 Exch. 541; *Eastwood* v. *Bain*, 3 H. & N. 738.

fully representing that he was authorised to accept by procuration; the jury, on the trial, negatived all fraud in fact, yet the defendant was held to be liable, because he had made a representation untrue to his own knowledge; and the plaintiff, acting upon the faith of that representation, and giving credit to the acceptance, which, in the ordinary course of business, was its natural and necessary result, had in consequence thereof sustained damage. It was observed in this case, that the defendant must be taken to have *intended* that *all* persons should give credit to the acceptance to whom the bill might be offered in the course of circulation, and that the plaintiff was one of those persons (*x*).

The case just cited will suffice to show that there may be cases in which a party will be held liable as for fraud, without proof of any morally fraudulent *motive* for the particular act, from which it is inferred; and we may observe, generally, that it is fraud in law if a party makes representations which he knows to be false, and from which injury ensues, although the motive from which the representations proceeded may not have been bad; and that the person making them will nevertheless be responsible for the consequences (*y*). Fraud may, as we have seen, consist as well in the *suppressio veri*—the suppression of what is true, as in the *suggestio falsi*—the representation or suggestion of what is false (*z*), of which one familiar instance presents itself in the case of a sea policy of insurance, which is made upon an implied contract between the parties, that everything

(*x*) See *Kitson* v. *West London Bk.*, 12 Q. B. D. 137.

(*y*) *Per* Tindal, C.J., 7 Bing. 107; cited, Judgm., *Rawlings* v. *Bell*, 1 C. B. 959, 960.

(*z*) *Per* Chambre, J., *Tapp* v. *Lee*, 3 B. & P. 371; cited 6 Bing. 403.

material known to the assured shall be disclosed by him, and which instrument will be invalidated if any material fact will be withheld. "When a policy of insurance," as observed by Lord *Abinger* (*a*), "is said to be a contract *uberrimæ fidei*, this only means that the good faith which is the basis of all contracts, is more especially required in that species of contract, in which one of the parties is necessarily less acquainted with the details of the subject of the contract than the other. Now, nothing is more certain, than that the concealment or misrepresentation, whether by principal or agent, by design or by mistake, of a material fact, however innocently made, avoids the contract on the ground of a legal fraud" (*b*). The rule, however, here stated, does not extend to guaranties—the concealment which will vitiate such an instrument must be fraudulent (*c*).

Cases as to moral fraud considered.

The necessity of showing "*moral fraud*," and of proving the *scienter* in an action on the case for misrepresentation, has been much discussed.

Cornfoot v. *Fowke*.

In *Cornfoot* v. *Fowke* (*d*), the plaintiff declared in

(*a*) 6 M. & W. 379; *Carter* v. *Boehm*, 3 Burr. 1905; *Harrower* v. *Hutchinson*, L. R. 4 Q. B. 523, 536, and cases there cited. *Lindenau* v. *Desborough*, 8 B. & C. 586; *Carr* v. *Montefiore*, 5 B. & S. 408. A fact known to the underwriter need not be mentioned by the assured, for *Scientia utrinque par pares contrahentes facit*: 3 Burr. 1910; *Bates* v. *Hewitt*, L. R. 2 Q. B. 609. See *Mackintosh* v. *Marshall*, 11 M. & W. 116; *Stokes* v. *Cox*, 1 H. & N. 533; S. C., *Id.* 320; and cases there cited.

Wheelton v. *Hardisty*, 8 E. & B. 232, 285, is important as regards the effect of fraud upon a life policy.

(*b*) *Acc. Anderson* v. *Thornton*, 8 Exch. 425; *Russell* v. *Thornton*, 6 H. & N. 140; S. C., 4 *Id.* 788; *Holland* v. *Russell*, 4 B. & S. 14.

(*c*) *North British Insur. Co.* v. *Lloyd*, 10 Exch. 523.

(*d*) 6 M. & W. 358. Compare with *Cornfoot* v. *Fowke*, *supra*, the Judgment in *Smout* v. *Ilbery*, 10 M. & W. 1; and *Collen* v. *Wright*, 7 E. & B. 301; S. C., 8 *Id.* 647; *Spalding* v. *Nevell*, L. R. 4 C. P. 212. See, also, *Wilde* v. *Gibson*, 1 H. L. Cas. 605.

assumpsit for the non-performance of an agreement to take a ready-furnished house. The defendant pleaded that he had been induced to enter into the contract by the fraud and covin of the plaintiff; and on this plea issue was joined. It appeared on the trial, that the plaintiff, being the owner of the house in question, employed an agent to let it, and the defendant, being in treaty with such agent for hiring, asked him, if there was "anything objectionable about the house?" upon which the agent replied, "nothing whatever." On the day after signing the agreement, the defendant discovered that the adjoining house was a brothel, and on that ground declined to fulfil the contract. It further appeared that the plaintiff was fully aware of the existence of the brothel, but that the agent was not. It was held by the majority of the Court of Exchequer (*dissentiente* Lord *Abinger*, C. B.), that it was not sufficient to support the plea that the representation turned out to be untrue, but that, for that purpose, it ought to have been proved to have been *fraudulently* made; whereas, the principal, though he knew the fact, was not cognisant of the representation being made, and never directed the agent to make it. The agent, though he made a misrepresentation, yet did not know it to be one at the time he made it, but gave his answer *bonâ fide*. It is obvious that the decision in this case, which has been much canvassed (*e*), in no degree conflicts with the proposition which seems consistent with reason and authority (*f*), that "if an agent is guilty

(*e*) In *Wheelton* v. *Hardisty*, 8 E. & B. 270, Lord Campbell, C.J., intimates that "the voice of Westminster Hall was rather in favour of the dissentient Chief Baron."

(*f*) In *Udell* v. *Atherton*, 7 H. & N. 172 (where the authorities are collected), the Judges of the Court of

of fraud in transacting his principal's business, the principal is responsible" (*g*)—that "the fraud of the agent who makes the contract is the fraud of the principal" (*h*). And "with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction," it has been observed (*i*), "can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit, though no express command or privity of the master be proved."

Fuller v. Wilson

In *Fuller* v. *Wilson*, which was an action on the case for a fraudulent misrepresentation of the value of a house, the facts were as follows:—The defendant, being the owner of a house in the City, employed her attorney to put it in a course of being sold by auction; he described it to the auctioneer as being free from rates and taxes, and it was bought by the plaintiff on that representation, for £600. It was, in fact, subject to rates and taxes, amounting to about £16 on a rent of £100, and would have been sold for no more than £470, if that representation had not been made. The plaintiff brought his action for this difference of price. It appeared that the defendant had, in fact, made no representation at all, and

Exchequer were equally divided in opinion as to the mode of applying the proposition *supra*, to the facts before them. See Judgm., *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 265.

(*g*) *Per* Parke, B., *Murray* v. *Mann*, 2 Exch. 540, and in *Cornfoot* v. *Fowke*, 6 M. & W. 373.

(*h*) Judgm., *Wheelton* v. *Hardisty*, 8 E. & B. 260.

(*i*) Judgm., *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 265.

that her attorney, who made the representation, did not know it to be false. The action was, nevertheless, held to be maintainable, on this express ground, that, whether there was moral fraud or not, if the purchaser was actually deceived in his bargain, the law would relieve him from it; that the principal and his agent were, for this purpose, completely identified: and that the question to be considered was, not what was passing in the mind of either, but whether the purchaser was, in fact, deceived by them, or either of them (*k*).

It seems, however, clear that the principle on which the judgment given by the Court of Queen's Bench in the above case was founded, is at variance with that which must now be considered as established: for, in the subsequent case of *Collins* v. *Evans* (*l*), it is expressly laid down that "a mere representation, untrue in fact, but honestly made," will not suffice to form the groundwork of an action on the case for misrepresentation; and in

(*k*) *Fuller* v. *Wilson*, 3 Q. B. 58. The facts of this case were afterwards turned into a special verdict; and on the facts *so stated* the judgment of the Court of Queen's Bench was reversed in the Exchequer Chamber; S. C., 3 Q. B. 68 and 1009. The court of error did not, however, enter into the principle on which the decision below was founded, nor into the question discussed in *Cornfoot* v. *Fowke*, *supra*. See, also, *Humphrys* v. *Pratt*, 5 Bligh, N. S, 154, which may be supported on another ground, as pointed out by Tindal, C.J., 5 Q. B. 829; *Railton* v. *Matthews*, 10 Cl. & Fin. 934; cited *North British Insur Co.* v. *Lloyd*, 10 Exch. 529, 533. As to statements by an agent under a misconception of facts. see, particularly, *Smout* v. *Ilbery*, 10 M. & W. 1; *Collen* v. *Wright*, 7 E. & B. 301; S. C., 8 *Id.* 647; *Spedding* v. *Nevell*, L. R. 4 C. P. 212.

Adverting to *Cornfoot* v. *Fowke*, and *Fuller* v. *Wilson*, *supra*, Wilde, B., observes: "The artificial identification of the agent and principal by bringing the words of the one side by side with the knowledge of the other, induced the apparent logical consequence of fraud. On the other hand, the real innocence of both agent and principal repelled the notion of a constructive fraud in either;" *Udell* v. *Atherton*, 7 H. & N. 184.

(*l*) In error, 5 Q. B. 820, reversing judgm. in S. C., *Id.* 804.

Ormrod v. *Huth* (*m*), where the question as to "moral fraud" was much discussed, case for a false and fraudulent representation respecting the quality of goods sold by sample, was held not maintainable without showing that such representation was false to the knowledge of the seller, or that he acted fraudulently or against good faith in making it. "The rule," said *Tindal*, C. J., delivering judgment, "which is to be derived from all the cases, appears to us to be, that where, upon the sale of goods, the purchaser is satisfied, without requiring a warranty (which is a matter for his own consideration), he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was bottomed in fraud. If, indeed, the representation was false to the knowledge of the party making it, this would in general be conclusive evidence of fraud; but if the representation was honestly made, and believed at the time to be true by the party making it, though not true in point of fact, we think this does not amount to fraud in law, but that the rule of *Caveat emptor* applies and the representation itself does not furnish a ground of action."

Further, the correctness of the principle laid down in *Collins* v. *Evans*, above cited, was recognised by the Court of Queen's Bench in *Barley* v. *Walford* (*n*), which shows, that, if A. knowingly utter a falsehood to B., with intent to defraud B., and with a view to his own profit, and B., giving credit to the falsehood, is injured thereby, he may maintain an action against A. for the false representation; though, as there observed by Lord *Denman*, C. J., "if every untrue statement which produces damage to another would found an action at law, a man might sue

(*m*) 14 M. & W. 651. (*n*) 9 Q. B. 197, 207, 208.

his neighbour for any mode of communicating erroneous information, such (for example) as having a conspicuous clock too slow, since plaintiff might be thereby prevented from attending to some duty or acquiring some benefit."

So, in another case, bearing on the law of principal and agent, *Parke*, B., observed, that, to make out fraud, some wilful misrepresentation must be shown, and that a mere untruth innocently told is not sufficient (*o*).

Nor does it seem at variance with the proposition just stated to affirm—in accordance with some high authorities—that if a man having the means of knowledge in regard to a certain fact, but neglecting to avail himself of them, undertakes to publish as true, that which he does not know to be true, he will be responsible if it should turn out to be false (*p*). "If," says *Maule*, J. (*q*), "a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud; for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may still have been fraudulently made." And again—"I apprehend it to be the rule of law," says

(*o*) *Atkinson* v. *Pocock*, 12 Jur. 60; S. C., 1 Exch. 796; referring to *Chandelor* v. *Lopus*, Cro. Jac. 4, and *Cornfoot* v. *Fowke*, 6 M. & W. 358. "It seems to us that a statement false in fact, but not false to the knowledge of the party making it, as in *Polhill* v. *Walter*, nor made with any intention to deceive, will not support an action, unless from the nature of the dealing between the parties a contract to indemnify can be implied:" Judgm., *Rawlings* v. *Bell*, 1 C. B. 959, 960.

(*p*) See *per* Cresswell, J., *Jarrett* v. *Kennedy*, 6 C. B. 322; *per* Lord Mansfield, C. J., *Pawson* v. *Watson*, Cowp. 785.

(*q*) *Evans* v. *Edmonds*, 13 C. B. 786.

Lord *Cairns* (*r*), "that if persons take upon themselves to make assertions as to which they are ignorant, whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue." In the case here put, an element or admixture of moral fraud is quite apparent. Indeed, an examination of the cases would seem to show that, wherever the conduct of a person is treated by the Courts as fraudulent, he has, whether with or without selfish motive, by word or action, made representations which were not true, to the actual or possible detriment of another, whether that other is a person dealing with him, or an entire stranger. In everyday life men consider a selfish motive an essential element of fraud, because it generally co-exists with it. The Law takes a higher standard, and punishes a man who has spoken falsely, without a distinct intention to benefit himself at the expense of others, if detriment to others results from his falsehood.

The expression legal fraud, which is said to have owed its origin to Lord Kenyon in 1801, has in more recent times been severely criticized, and indeed condemned as useless and misleading. "I do not understand legal fraud," said *Bramwell*, B., in *Weir* v. *Bell* (*s*). "To my mind, it has no more meaning than legal heat, or legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud except where some duty is shown and correlative right, and some violation of that duty and right. *Fraud has the same meaning when used in Courts of Law as in ordinary par-*

(*r*) *Reese River Silver Mining Co.* v. *Smith*, L. R. 4 H. L. 79—80.

(*s*) 3 Ex. D. 238, at p. 243; and see *Joliffe* v. *Baker*, 11 Q. B. D. 255; 52 L. J. Q. B. 609.

lance, and implies deceit, base conduct, and moral turpitude."

Title of vendor.

The remarks immediately preceding may suffice to indicate some of the more important qualifications of the rule *Caveat emptor*, as applied to the *quality* and description of goods sold. It is now proposed to consider briefly how far this maxim holds with reference to the *title* of the vendor to goods which form the subject-matter of a sale or contract. According to the civil law, it is clear that a warranty of title was implied on every sale of a chattel (*t*); and this doctrine of the civil law seems to have been partially adopted by the American courts of judicature (*u*); where a distinction is observed, which many of the leading authorities in this country have discountenanced, between goods in the possession of the vendor and goods not in his possession, the rule in America is, that as to the former there is an implied warranty of title, but not so in the case of the latter (*x*). It is, however, now established that there is "by the law of England, no warranty of *title* in the actual contract of sale, any more than there is of *quality*. The rule of *Caveat emptor* applies to both; but if the vendor knew that he had no title, and concealed that fact, he was always held responsible to the purchaser as for a fraud, in the same way that he is if he knew of the defective quality" (*y*). But

(*t*) D. 21. 2. 1. Voet. ad Pand., 6th ed., vol. i. p. 922. According to our law, if at the time of the contract the vendor was not aware of any defect in the estate, the purchaser takes it with all its faults. 1 Sugd., V. & P., 13th ed., p. 1.

(*u*) Kent, Com., 13th ed., vol. 2, pp. 478–9. See *Defreeze* v. *Trumper*, 1 Johns. (U. S.), R. 274; *Rew* v. *Barber*, 3 Cowen (U. S.), R. 272.

(*x*) Benj. Sales, 3rd ed. 631.

(*y*) Judgm., *Morley* v. *Attenborough*, 3 Exch. 510; cited *per* Pollock, C.B., *Bandy* v. *Cartwright*, 8 Exch. 916; and commented on *per* Lord Campbell, C. J., *Sims* v. *Mar-*

although such is the general rule of our law, the circumstances attending the sale of a chattel may necessarily import a warranty of title. Thus, if articles are bought in a shop professedly carried on for the sale of goods, the shop-keeper would, doubtless, be considered as warranting "that those who purchase will have a good title to keep the goods purchased. In such a case the vendor sells 'as his own,' and that is what is equivalent to a warranty of title" (*z*).

As between vendor and purchaser, indeed, the result of the older authorities seems to be, that, where a person sells goods to which in fact he has no title, he will not be responsible to the purchaser if the latter be subsequently disturbed in his possession by the true owner, unless there be either a warranty or a fraudulent misrepresentation as to the property in the goods by the vendor (*a*). This doctrine has, however, been much restricted in its practical operation by holding that a simple assertion of title is equivalent to a warranty (*b*), and generally that any repre-

ryatt, 17 Q. B. 290–1; *per* Bovill, C.J.; *Bagueley* v. *Hawley*, L. R. 2 C. P. 625, 628; *Chapman* v. *Speller*, 14 Q. B. 621; *per* Martin, B., *Aiken* v. *Short*, 1 H. & N. 213.

(*z*) Judgm., 3 Exch. 513; *Eichholz* v. *Bannister*, 17 C. B. N. S. 708.

(*a*) See *Peto* v. *Blades*, 5 Taunt. 657; *Jones* v. *Bowden*, 4 Taunt. 847; *Sprigwell* v. *Allen*, Aleyn., R. 91; and *Paget* v. *Wilkinson*, cited 2 East, 448, n. (*a*). In *Early* v. *Garrett*, 9 B. & C. 932, Littledale, J., observes, "It has been held, that where a man sells a horse as his own (*Sprigwell* v. *Allen*, *supra*), when in truth it is the horse of another, the purchaser cannot maintain an action against the seller, unless he can show that the seller knew it to be the horse of the other at the time of sale; the *scienter*, or fraud, being the gist of the action, *where* there is no warranty; for there the party takes upon himself the knowledge of the title to the horse, and of his qualities." See *Robinson* v. *Anderton*, Peake, N. P. C., 94; *Street* v. *Blay*, 2 B. & Ad. 456; cited, *Dawson* v. *Collis*, 10 C. B. 527, 532; and in *Kennedy* v. *Panama, &c., Mail Co.*, L. R. 2 Q. B. 587.

(*b*) See *Collen* v. *Wright*, 7 E. & B. 301; S. C., 8 *Id.* 647.

sentation may be tantamount thereto, if the party making it appear from the circumstances under which it was made to have had an intention to warrant, or to have meant that the representation should be understood as a warranty (*c*).

Upon the whole, then, we may safely conclude, that with regard to the sale of ascertained chattels, "there is not any implied warranty of either *title* or *quality* (*d*), unless there are some circumstances beyond the mere fact of a sale, from which it may be implied" (*e*).

It is right to inform the reader that, in the opinion of so great an authority as Mr. Benjamin, the case of *Eichholz* v. *Bannister* has had the effect of materially altering the rule of law upon this subject. The old rule he considers to have become the exception, and he thus states the effect of the recent decisions. *A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title,* unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to

(*c*) *Crosse* v. *Gardner*, Carth. 90; *Medina* v. *Stoughton*, 1 Salk. 210; cited *per* Patteson, J., 17 Q. B. 293. See *Bartholomew* v. *Bushnell*, 20 Day (U. S.), R. 271; *Furnis* v. *Leicester*, Cro. Jac. 474; Judgm., *Adamson* v. *Jervis*, 4 Bing. 73. See, *per* Buller, J., 3 T. R. 57, 58; *Sanders* v. *Powell*, 1 Lev. 129. As to an express warranty, see *per* Lord Ellenborough, C.J., *Williamson* v. *Allison*, 2 East, 451, which was an action on the case for breach of warranty of goods; *Gresham* v. *Postan*, C. & P. 540; *Denison* v. *Ralphson*, 1 Ventr. 365.

(*d*) In support of this proposition as regards *quality*, see the cases *ante*, pp. 733 *et seq.* In *Hill* v. *Balls*, 2 H. & N. 304, Martin, B., remarks, "In my view of the law, where there is no warranty, the rule *Caveat emptor* applies to sales, and except there be deceit, either by a fraudulent concealment or fraudulent misrepresentation, no action for unsoundness lies by the vendee against the vendor upon the sale of a horse or other animal."

(*e*) Judgm., *Hall* v. *Conder*, 2 C. B. N. S. 40; recognising *Morley* v. *Attenborough*, 3 Exch. 500.

transfer such interest as he might have in the thing sold (*f*).

With respect "to *executory* contracts of purchase and sale, *where the subject is unascertained*, and is afterwards to be conveyed, it would probably be implied that both parties meant that a good title to that subject should be transferred, in the same manner as it would be implied, under similar circumstances, that a merchantable article was to be supplied. Unless goods, which the party could enjoy as his own, and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept if he discovered the defect of title before delivery; and if he did, and the goods were recovered from him, he would not be bound to pay, or, having paid, he would be entitled to recover back the price as on a consideration which had failed" (*g*).

We may add to the above brief *resumé* of the law in regard to the application of the maxim *Caveat emptor* on a sale of goods, that it has been laid down as a general proposition, that, "if goods be sold by a person who is not the owner, and the owner be found out and be paid for those goods, the person who sold them under pretended authority has no right to call upon the defendant to pay him also" (*h*). For example, though an auctioneer, inasmuch as he has a lien on the purchase-money, may bring an action against the purchaser in his own name for the

(*f*) Benjamin, Sale, pp. 630-1.

(*g*) Judgm., 3 Exch., 509-10; *per* Lord Campbell, C. J., *Sims* v. *Marryatt*, 17 Q. B. 291.

As to implied warranty of title to a thing pledged, see *Cheesman* v. *Exall*, 6 Exch. 341.

On a contract for the sale of goods in the possession of a third person, the vendor impliedly undertakes that they shall be delivered, on application, within a reasonable time; *Buddle* v. *Green*, 27 L. J., Ex., 33.

(*h*) Judgm. (*Allen* v. *Hopkins*), 13 M. & W. 102; citing *Dickenson* v. *Naul*, 4 B. & Ad. 638. See *Walker* v. *Mellor*, 11 Q. B. 478.

price of goods sold, and the purchaser has no right to plead payment to the employer of the auctioneer, still if the employer was not the true owner of the goods, the defendant in such an action could plead payment to or a claim by such true owner (*i*).

Who may confer title by sale

It may be stated that, as a general rule, no man can acquire a title to chattels from a person who has himself no title to them (*k*). The vendee of a chattel cannot, in general, stand in a better situation than his vendor—*nemo dat quod non habet* (*l*). For instance, if a master entrust his servant with the care of plate or other valuables, and the servant sells them, still, unless they are sold in market overt, the master may recover them from the purchaser (*m*). And we find it laid down that "the owner of property wrongfully taken has a right to follow it, and, subject to a change by sale in market overt, treat it as his own, and adopt any act done to it" (*n*). It has been said indeed, that if the real owner of goods suffer another to have possession of his property, or of those documents which are the *indicia* of property, and thus enable him to hold himself out to the world as having not the possession only but the property, then, perhaps, a sale by such a person would bind the true owner (*o*). Though it seems that the proposition here

Exceptions to above rule: 1st. Person in possession of goods, with sanction of owner.

(*i*) *Robinson* v. *Rutter*, 4 E. & B. 954; *Dickenson* v. *Naul*, 4 B. & Ad. 638; and see *Grice* v. *Kendrik*, L.R. 5 Q. B. 340; 39 L. J. Q. B. 175.

(*k*) *Peer* v. *Humphrey*, 2 A. & E. 495; *per* Abbott, C. J., *Dyer* v. *Pearson*, 3 B. & C. 42.

(*l*) *Per* Littledale, J., *Dixon* v. *Yates*, 5 B. & Ad. 339; *Lindsay* v. *Cundy*, 3 App. Cas., *per* Ld. Cairns.

(*m*) *Per* Abbott, C. J., *Baring* v. *Corrie*, 2 B. & Ald. 143; *per* Holroyd, J., *Id.*, 149; Cro. Jac. 197.

(*n*) *Per* Pollock, C.B., *Neate* v. *Harding*, 5 Exch. 350; citing *Taylor* v. *Plumer*, 3 M. & S. 562.

(*o*) *Per* Abbott, C. J., 3 B. & C. 42; *per* Bayley, J., 6 M. & S. 23, 24; *per* Best, C. J., 3 Bing. 145. See, also, *Gordon* v. *Ellis*, 8 Scott, N. R., 290.

stated ought to be limited to cases where the person who had possession of the goods was one who, from the nature of his employment, might be taken *primâ facie* to have the right to sell (*p*). As for instance, the master of a ship, where it is impossible to forward goods to their destination, or necessary to raise money for the purposes of a voyage (*q*). And where a transfer of goods was obtained under a delivery order without authority and by false pretences, it was held that mere possession of the goods, with no further *indicia* of title than the delivery order, would not suffice to entitle a *bonâ fide* pawnee of the person fraudulently obtaining possession of the goods from the true owner, to resist the claim of the latter in an action of trover (*r*).

Factors and consignees.

By the Factors Act (6 Geo. IV. c. 94), s. 2, "persons entrusted with and in possession of any bill of lading, Indian warrant, dock warrant, warehouse-keeper's certificate, warrant or order for the delivery of goods, shall be deemed to be the true owner of the goods so far as to give validity to sales to persons who may be ignorant that such vendors were not owners. By s. 4, persons who purchase from an agent entrusted with any goods, wares, or merchandise are protected, notwithstanding notice that the vendors are agents, provided the purchase and payment be made in the usual and ordinary course of business, and the buyer has not notice at the time of purchase and payment, of the absence of authority in the agent to make the sale or to receive the payment. By an Amending Act, 5 & 6 Vict. c. 39, the

(*p*) *Per* Martin, B., *Higgons* v. *Burton*, 26 L. J., Ex., 343, 344; citing Chitt. Contr., 6th ed., 344.

(*q*) Maude and Pollock on Shipping (ed. 1881), 580.

(*r*) *Kingsford* v. *Merry*, 1 H. & N. 503; S. C., 11 Exch. 577, as to which case see *per* Bramwell, B., *Higgons* v. *Burton*, 26 L. J., Ex., 334; *per* Willes, J., *Fuentes* v. *Montis*, L. R. 3 C. P. 282, 283.

possession of the goods themselves is treated as having the same effect as the possession of documents of title relating to them. The expression "agent entrusted with and in possession" has given rise to much discussion. The words are vague, and must be accepted with the limitation, "an agent entrusted as such and ordinarily having as such agent a power of sale or pledge" (*s*).

Cases from time to time came before the Courts which revealed the imperfections of the acts which we have noticed. For example—a vendor allowed by the purchaser to retain possession of the documents of title to goods was held not to be an agent entrusted under 5 & 6 Vict. c. 39, s. 1 (*t*). Again, a purchaser obtaining possession of the documents of title to goods was held not to come within the section (*u*). And in another case it was held that a *pledgee* of goods was not protected if the entrustment had been withdrawn from the agent before the pledge was given by him, even though the withdrawal of authority was secret and possession remained (*x*). A purchaser, in similar circumstances would also have been unprotected. The deficiencies exposed by these cases have been rectified by another Amendment Act, 40 & 41 Vict. c. 39 (*y*).

(*s*) *Per* Bramwell, B., in *Cole* v. *N. W. Bank*, L. R. 10 C. P. 354 at p. 375; *per* Blackburn, J., p. 357. *Heyman* v. *Fleuker*, 13 C. B. N. S. 519 at p. 527, *per* Willes, J. *Fuentes* v. *Montis*, L. R. 3 C. P. 275, *per eundem*. See also *Baines* v. *Swainson*, 4 B. & S. 270; *Vickers* v. *Hertz*, L. R. 2 Sc. App. 113; *Hatfield* v. *Philips*, 14 M. & W. 665; 12 Cl. & F. 343.

(*t*) *Johnson* v. *Credit Lyonnais Co.*, 2 C. P. D. 224; 3 C. P. D. 32.

(*u*) *Jenkyns* v. *Usborne*, 7 M. & G. 678; *Van Casteel* v. *Booker*, 2 Ex. 691.

(*x*) *Fuentes* v. *Montis*, L. R. 3 C. P. 268.

(*y*) It is unnecessary to remind the student that the Factors Acts deal also with the pledging of goods by agents and factors, a subject not relevant to this maxim. For a more exhaustive treatment of these important statutes the reader is referred to Benj. Sales, Bk. I. Pt. 1, c. 2, and Bk. V. pt. 1, c. 4.

2nd. Sale in market overt.

A sale of goods, even by a party who has himself only the possession, and not the property, as a thief or a finder, will be valid against the rightful owner, provided it be made in market overt during the usual market hours, unless such goods were the property of the king (*z*), or unless the buyer knew that the property was not in the seller, or there was any other fraud in the transaction (*a*); but such a sale does not protect an innocent vendor against the true owner (*b*), and if the original vendor who sold without title, come again into possession after any number of intervening sales, the right of the original owner revives (*c*).

Market overt, we may observe, is defined to be a fair or market held at stated intervals in particular places, by virtue of a charter or prescription (*d*); it has been characterised as "an open, public, and legally constituted market" (*e*). The protection is not confined to ancient but extends also to modern markets established under power conferred by Act of Parliament (*f*).

In the city of London, however, the custom is, that every shop is, except on Sunday, market overt, in regard to the goods usually and publicly sold therein (*g*); and a

(*z*) Chitt. Pre. Cr. 195, 285. The doctrine of our law as to the effect of a sale in market overt, is stated *per* Cockburn, C. J., *Crane* v. *London Dock Co.*, 5 B. & S. 313, 318, where a sale by sample was held not entitled to the privileges of a sale in market overt.

(*a*) 2 Bl. Com. 172; 2 Inst. 713; *Hilton* v. *Swan*, 5 Bing. N. C. 413.

(*b*) *Ganley* v. *Ledwidge*, 10 Ir. R. C. L. 33.

(*c*) 2 Bl. Com. 450; 2 Inst. 713. *Freeman* v. *E. India Co.*, 5 B. & A. 624.

(*d*) Jacob, Law Dict., tit. "*Market:*" 2 Inst. 713. *Case of Market Overt*, 5 Rep. 84.

(*e*) *Per* Jervis, C. J., 18 C. B. 601. As to what is a legally constituted market, see *Benjamin* v. *Andrews*, 5 C. B. N. S. 299; 27 L. J. M. C. 310.

(*f*) *Ganley* v. *Ledwidge*, *ubi supra*.

(*g*) Jacob, Law Dict., tit. "*Mar-*

sale within the city of London, in an open shop, of goods usually dealt in there, is a sale in market overt, though the premises are described in evidence as a warehouse, and are not sufficiently open to the street for a person on the outside to see what passes within (*h*). By stat 1 Jac. 1, c. 21, it is enacted, that the sale of any goods wrongfully taken to any pawnbroker in London, or within two miles thereof, shall not alter the property; for this being usually a clandestine trade, is therefore made an exception to the general rule (*i*).

With respect to stolen goods, the stat. 24 & 25 Vict. c. 96, s. 100, enacts, that, if any person, guilty of any such felony or misdemeanor as therein mentioned, in stealing taking, obtaining, extorting, embezzling, or converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted by or on behalf of the owner, his executor, or administrator, and convicted, in such case, the property shall be restored to the owner or his representative, and the Court shall have power to award writs of restitution or to order restitution in a summary manner (*k*). Under the statute even a purchaser in market overt may have to

24 & 25 Vict. c. 96.

ket:" *Harris* v. *Shaw*, Cas. *temp.* Hardw. 349; and authorities cited *supra*.

(*h*) *Lyons* v. *De Pass*, 11 A. & E. 326. But a sale by public auction at a horse repository out of the City of London is not a sale in market overt; *Lee* v. *Bayes*, 18 C. B. 599. As to the statutes respecting stolen horses (2 P. & M. c. 7, and 31 Eliz. c. 12), see 2 Bla. Com., 21st ed., 450; Oliphant's Law of Horses, 2nd ed., p. 45.

(*i*) See, also, stat. 39 & 40 Geo. 3, c. 99, ss. 12, 13. A metropolitan police magistrate may order goods unlawfully pawned to be delivered up to their owner; 35 & 36 Vict. c. 93.

(*k*) The order of restitution under the corresponding enactment previously in force (7 & 8 Geo. 4, c. 29, s. 57) was held to be "cumulative to the ordinary remedy by action," and "not a condition precedent to such remedy;" *Scattergood* v. *Sylvester*, 15 Q. B. 506, 511. See, also, 30 & 31 Vict. c. 35, s. 9.

restore goods to the owner, and his only hope of compensation will depend upon the 30 & 31 Vict. c. 35, s. 9, which enables a Court to order that any money taken from a thief upon his apprehension may be applied to reimbursing an innocent purchaser the price paid by him.

It has been decided that a person who may have purchased the goods in market overt after the felony, and disposed of them again before the conviction, even with notice of the theft from the true owner is not liable in trover to him (*l*). Where, however, a purchase of stolen property was made *bonâ fide*, but *not* in market overt, and the plaintiff gave notice to the defendant, who subsequently sold the goods in market overt, after which the plaintiff prosecuted the felon to conviction, the plaintiff was held entitled to recover from the defendant the value of the property in trover (*m*).

In a recent case it has been held that where the owner of goods parts with the property in them under a contract, which he is induced to enter into by false pretences, the statute does not revest the property in him as against a person who acquires a good title in them before the conviction of the wrongdoer (*n*). Here it was held, that the statute was intended to apply to those cases only in which possession has been obtained, without the property passing. This is always the result of larceny, but may occur also where the fraud practised upon the owner by the wrongful possession has been such as to displace

(*l*) *Horwood* v. *Smith*, 2 T. R. 750.

(*m*) *Peer* v. *Humphrey*, 2 A. & E. 495. See, also, *Parker* v. *Patrick*, 5 T. R. 175, which was decided under stat. 21 Hen. 8, c. 11, repealed by 7 & 8 Geo. 4, c. 27, s. 1.

(*n*) *Moyse* v. *Newington*, 4 Q. B. D. 32.

the notion of contract (*o*). In *Lindsay* v. *Cundy*, the circumstances were of that nature, a person having obtained goods from the plaintiff by assuming an alias resembling that of a well-known firm, and inducing the plaintiff to believe that he was dealing with that firm.

It was once thought that where goods had been stolen, and not sold in market overt, they could not be recovered from an innocent purchaser until the owner had prosecuted the thief. It is, however, now well established that the obligation which the law imposes on a plaintiff to prosecute the party who has stolen his goods before proceeding for their recovery, does not apply where the action is against a third party, innocent of the felony (*p*).

3rdly. Sale by pledgee.

Another exception to the general rule that title can only be derived from the true owner is afforded by the case of sale of goods by one to whom they have been pledged. A pawnee may sell goods pledged to him, if the pawnor make default in payment at the stipulated time; this right he may exercise without having taken proceedings to recover from the pawnee the sum due to him (*q*).

4thly. Negotiable instruments.

Lastly, we may observe, that negotiable instruments form the most important exception to the rule, that a valid sale cannot be made except in market overt of property to which the vendor has no right. In the lead-

(*o*) *Lindsay* v. *Cundy*, 3 App. Cas. 459.

(*p*) *White* v. *Spettigue*, 13 M. & W. 603; *Lee* v. *Bayes*, 18 C. B. 599; *Wells* v. *Abrahams*, L. R. 7 Q. B. 554; *Ex pte. Ball*, 10 Ch. D. 667. C. A. and *Midland Insur. Co.* v. *Smith*, 6 Q. B. D. 561,

(*q*) *Pothoneir* v. *Dawson*, Holt, 385; *Tucker* v. *Wilson*, 1 P. Williams, 261; *Lockwood* v. *Ewer*, 9 Mod. 278; *Martin* v. *Read*, 11 C. B. N. S. 730; *Johnston* v. *Stear*, 15 C. B. N.S. 330; *Pigot* v. *Cubley*, 15 C. B. N. S. 701; *Halliday* v. *Holgate*, L. R. 3 Ex. 299.

ing case on this subject, it was decided, that property in a bank-note passes, like that in cash, by delivery, and that a party taking it *bonâ fide* (*r*), and for value, is entitled to retain it as against a former owner from whom it has been stolen (*s*). It is, however, a general rule, that no title can be obtained through a forgery, and hence a party from whom a promissory note was stolen, and whose indorsement on it was subsequently forged, was held entitled to recover the amount of the note from an innocent holder for value (*t*). And if a person obtains in good faith change for a cheque which turns out to be worthless, the loss must fall on him (*u*). It should further be observed, that every negotiable instrument being in its nature precisely analogous to a bank-note, payable to bearer, is subject to the same rule of law;—whoever is the holder of

(*r*) *Hilton* v. *Swan*, 5 Bing. N. C. 413; and see 24 & 25 Vict. c. 96, s. 100, which contains a proviso that restitution shall not be awarded in the case of any valuable security which shall have been *bonâ fide* paid or discharged by the party liable to the payment thereof, or in that of a negotiable instrument taken by transfer or delivery for a just and valuable consideration, without notice or cause to suspect that the same had been stolen.

The above section does not apply to the case where a trustee, banker, or agent entrusted with the possession of goods, or documents of title to goods, is prosecuted for any misdemeanor under the Act.

(*s*) *Miller* v. *Race*, 1 Burr. 452. The reader is referred for full information on this subject, and also on that of *bona fides* in the holder, to the Note appended to the above case, Smith, L. C., 8th ed. vol. i. p. 515, Judgm., *Guardians of Lichfield Union* v. *Greene*, 1 H. & N. 884, 889.

(*t*) *Johnson* v. *Windle*, 3 Bing., N. C. 225, 229; *Gurney* v. *Womersley*, 4 E. & B. 133; *Robarts* v. *Tucker*, 16 Q. B. 560 (distinguished in *Woods* v. *Thiedemann*, 1 H. & C. 478, 491, 495); *Simmons* v. *Taylor*, 2 C. B. N. S. 528.

(*u*) *Per* Lord Campbell, C. J., *Timmins* v. *Gibbins*, 18 Q. B. 726; *Woodland* v. *Fear*, 7 E. & B. 519, 521.

Where a banker pays a forged cheque or letter of credit, the banker must, in general, bear the loss; *British Linen Co.* v. *Caledonian Insur. Co.*, 4 Macq. Sc. App. Cas. 107; *Young* v. *Grote*, 4 Bing. 253.

such an instrument has power to give title to any person honestly acquiring it (*x*).

One rather peculiar case may here properly be mentioned, which is not only illustrative of the general legal doctrines regulating the rights of purchasers, but likewise of another principle (*y*), which we have already considered in connection with criminal law; *viz.*, where a man buys a chattel which, unknown to himself and to the vendor, contains valuable property. In a modern case (*z*) on this subject, a person purchased, at a public auction, a bureau, in a secret drawer of which he afterwards discovered a purse containing money, which he appropriated to his own use. It appeared that, at the time of the sale, no person knew that the bureau contained anything whatever. The Court held, that, although there was a delivery of the bureau, and a lawful property in it thereby vested in the purchaser, yet that there was no delivery so as to give him a lawful possession of the purse and money, for the vendor had no intention to deliver it, nor the vendee to receive it; both were ignorant of its existence; and when the purchaser discovered that there was a secret drawer containing the purse and money, it was a simple case of finding (*a*), and then the law applicable to all cases of finding would apply to this. It was further observed, that the old rule (*b*), that "if one loose his goods and another find them, though he convert them, *animo furandi*, to his own use, it is no larceny," has undergone

(*x*) *Per* Abbott, C.J., *Gorgier* v. *Mieville*, 3 B. & C. 47.

(*y*) *Actus non facit reum nisi mens sit rea.*

(*z*) *Merry* v. *Green*, 7 M. & W. 623.

(*a*) See *Armory* v. *Delamirie*, 1 Stra. 504; *Bridges* v. *Hawkesworth*, 21 L. J., Q. B., 75 (which is important with reference to the above subject); *Buckley* v. *Gross*, 32 L. J., Q. B., 129.

(*b*) 3 Inst. 108.

in more recent times, some limitations (*c*). One is, that, if the finder knows who the owner of the lost chattel is, or if, from any mark upon it, or the circumstances under which it is found, the owner could be reasonably ascertained, then the taking of the chattel, with a guilty intent, and the subsequent fraudulent conversion to the taker's own use, may constitute a larceny. To this class of decisions the case under consideration was held to belong, *unless* the plaintiff had reason to believe that he bought the contents of the bureau, if any, and consequently had a *colourable* right to the property in question.

In the preceding remarks upon the maxim *Caveat emptor*, we have confined our attention to those classes of cases to which alone it appears to be *strictly* applicable, and in connection with which reference to it is, in practice, most frequently made. To consider all the applications of the maxim which is invoked so frequently in discussions relating to the rights and duties of a purchaser would not have been possible within the limit of this treatise.

QUICQUID SOLVITUR, SOLVITUR SECUNDUM MODUM SOLVENTIS—QUICQUID RECIPITUR, RECIPITUR SECUNDUM MODUM RECIPIENTIS. (*Halk. M. p.* 149.)—*Money paid is to be applied according to the intention of the party paying it; and money received, according to that of the recipient* (*d*).

Appropriation of money paid.

"According to the law of England, the debtor may, in the first instance, appropriate the payment—*solvitur in modum solventis;* if he omit to do so, the creditor may

(*c*) See this rule with its qualifications considered at length, Broom's Com., 5th ed., *et seq.*

(*d*) For more detailed information

make the appropriation (*e*)—*recipitur in modum recipientis;* but if neither make any appropriation, the law appropriates the payment to the earlier debt" (*f*); "where a creditor receives, without objection, what is offered by his debtor, *solvitur in modum solventis*, and it must be implied that the debtor paid it in satisfaction" (*g*); where "the party to whom the money is offered does not agree to apply it according to the expressed will of the party offering it, he must refuse and stand upon the rights which the law gives him" (*h*). And again—"Wherever there is an intention expressed by the payer that the money is paid upon a particular account, and the payee receives it under a different intention, it is the duty of the latter to give the former an opportunity to retract." Such "was the rule of the civil law—*Dum in re agendâ hoc fiat: ut vel creditori liberum sit non accipere vel debitori non dare, si alio nomine exsolutum quis eorum velit; cæterum postea non permittitur.* What is intended must be said at the time" (*i*).

Thus, succinctly, in the above propositions, has the law

than can here be offered in regard to this maxim, the reader is referred to a learned article by Lord Justice, then Mr. Lindley, in the Law Mag. for Aug. 1855, p. 21.

(*e*) "Where a claim consists of several items, the party making the tender has a right of appropriation; but if he omits to make any appropriation, the right to appropriate is transferred to the other party;" *per* Wilde, C.J., *Hardingham* v. *Allen*, 5 C. B. 797; and in *Wood* v. *The Copper Miners' Co.*, 7 *Id.* 935.

(*f*) *Per* Tindal, C.J., *Mills* v. *Fowkes*, 5 Bing., N. C., 461; *per* Bayley, J., 2 B. & C. 72; *per* Sir L. Shadwell, V. C. E., *Greenwood* v. *Taylor*, 14 Sim. 522; *Toulmin* v. *Copland*, 2 Cl. & Fin. 681. See *James* v. *Child*, 2 Cr. & J. 678; *Newmarch* v. *Clay*, 14 East, 239; *Id.* 243 (*c*).

(*g*) *Per* Tindal, C.J., *Webb* v. *Weatherby*, 1 Bing., N. C., 505; *Croft* v. *Lumley*, 6 H. L. Cas. 672, 694, 697, 714, 722, where the mode of applying the maxim *supra* was much discussed.

(*h*) Judgm., *Croft* v. *Lumley*, 5 E. & B. 680; S. C., 6 H. L. Cas., 672, 706. As to evidence of assent to an appropriation, see *Beale* v. *Caddick*, 2 H. & N. 326.

(*i*) *Per* Byles, J., *Kitchin* v. *Hawkins*, L. R. 2 C. P. 31.

relative to the principal maxim been explained, and, in accordance with this explanation, it has been held, that, where the defendant, being indebted to the plaintiff for goods supplied to his wife *dum sola*, and to himself after the marriage, made a payment without any specific appropriation, the plaintiff might apply the money in discharge of the debt contracted by the wife *dum sola* (*k*); that where part of a debt was barred by the Statute of Limitations, a payment of money made generally might be applied in liquidation of that part (*l*); but it is to be noticed, that it would not be such a payment on account of the whole debt as to take the remainder out of the operation of the Statute of Limitations, supposing at the time of payment the whole to have been statute barred; unless it is made under such circumstances that a promise to pay the remainder may be reasonably inferred (*m*).

A creditor receiving money without any specific appropriation by the debtor shall be permitted in a Court of law to apply it to the discharge of a prior and purely equitable debt (*n*). Moreover, it has been held, that the creditor is not bound to state at the time when a payment is made, to what debt he will apply it, but that he may

(*k*) *Goddard* v. *Cox*, 2 Stra. 1194.

(*l*) *Mills* v. *Fowkes*, 5 Bing., N. C., 455; *Williams* v. *Griffith*, 5 M. & W. 300. See *Baildon* v. *Walton*, 1 Exch. 617. In *Walker* v. *Butler*, 6 E. & B. 510, Erle, J., observes, "I do not by any means assent to the doctrine that where there are two debts existing, and a payment is made not specifically appropriated to either, there is necessarily no sufficient evidence of a payment on account of either of those debts to take it out of the Statute of Limitations. It must depend on the special circumstances of each case. In general there would be evidence to go to the jury of a payment on account of both debts."

(*m*) *Mills* v. *Fowkes*, *supra*; *Morgan* v. *Rowlands*, L. R. 7 Q. B. 493; 41 L. J. Q. B. 187; *Re Rainforth*, *Gwynne* v. *Gwynne*, 49 L. J. Ch. 5.

(*n*) *Bosanquet* v. *Wray*, 6 Taunt. 597. In *Goddard* v. *Hodges*, 1 Cr. & M. 33, it was held that a general payment must be applied to a prior legal, and not to a subsequent equitable demand.

make such application at any period before the matter comes under the consideration of a jury (*o*).

A case further illustrating the practical operation of the doctrine respecting the appropriation of payments may here be presented from a modern judgment (*p*):—Suppose a contract under seal, whereby a builder contracts to build a house, and the owner of the land covenants to pay £1000 as the price of the work, and also to pay for any extra work authorised *in writing* by the architect. During the progress of the works the architect authorises extra work to the amount of £500, which the builder completes in a proper manner and to the satisfaction of the owner of the land, but *without any authority in writing*. Suppose, further, that the owner of the land pays the builder from time to time £1200 on account generally, and that more than six years after the whole has been completed, the builder brings an action of covenant against the owner for non-payment of the balance, and the owner pleads payment. Under such circumstances, the owner of the land might be taken to have entered into a new *parol* contract to pay for the extras, independently of his liability under the deed. There would, in the case here put, be two debts due from the owner of the land, one a debt arising by deed, the other a debt on simple contract, and the doctrine as to the application of indefinite payments would apply. The creditor being entitled to say to his debtor, "I have applied 500*l*. part of the 1200*l*. in discharge of the simple contract debt, which would otherwise be barred by the Statute of Limitations; what I seek to recover is the balance of the original contract sum of 1000*l*." This

(*o*) *Philpott* v. *Jones*, 2 A. & E. 41.

(*p*) Judgm., 3 Exch. 306, 307.

doctrine, however, never has been held "to authorise a creditor receiving money on account, to apply it towards the satisfaction of what does not, nor ever did, constitute any legal or equitable demand against the party making the payments."

But although it is true that, where there are distinct accounts and a general payment, and no appropriation made at the time of such payment by the debtor, the creditor may apply it to which account he pleases ; yet where the accounts are treated by the parties as one entire account, this rule does not apply (*q*). For instance, in the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably it is the first sum paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon this principle all accounts current are usually settled, and particularly cash accounts (*r*), and in the absence of evidence to the contrary, such will be

(*q*) *Per* Bayley, J., *Bodenham* v. *Purchas*, 2 B. & Ald. 45. *See Labouchere* v. *Tupper*, 11 Moo. P. C. C. 198.

(*r*) *Per* Sir Wm. Grant, M.R., *Clayton's case*, 1 Mer. 608 ; cited, *per* Erle, C.J., 8 C. B. N. S. 786 ; *Pennell* v. *Deffell*, 4 De G. M. & G. 372 ; *per* Lord Lyndhurst, C., *Pemberton* v. *Oakes*, 4 Russ. 169 ; *Bodenham* v. *Purchas*, 2 B. & Ald. 39 ; Arg., *Labouchere* v. *Tupper*, 11 Moo. P. C. C. 212 ; Judgm., *Henniker* v. *Wigg*, 4 Q. B. 794. As to *Clayton's case*, *supra*, see, also, the remarks in the Law Mag. (Aug. 1855), p. 36.

Ordinarily, "where two parties settle an account of monies due to each side, cross items allowed in such account may be treated as payments :" Judgm., *Roberts* v. *Shaw*, 4 B. & S. 56.

presumed as a fact to have been the course of business between the creditor and his debtor, but this presumption of fact like others may be rebutted by the circumstances of the case, showing that such could not have been the intention of the parties (*s*). In like manner, where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt. In that case it is to be presumed that all the parties have consented that it should be considered as one entire account, and that the death of one of the partners has produced no alteration whatever (*t*).

The following remarks made in a modern case, will serve to show some additional important limitations of the maxim under consideration:—"If, in the course of dealing between A. and B., various debts are from time to time incurred, and payments made by B. to A., and no acknowledgment is made by A., nor inquiry by B. how the payments are appropriated, the law will presume that the priority of debt will draw after it priority of payment and satisfaction, on the ground that the oldest debt is entitled to be first satisfied. That doctrine is recognised in *Devaynes* v. *Noble* (*x*); but the principle was never applied to cases where the obligations were *alio jure*, nor

(*s*) *The City Discount Co.* v. *Mclean*, L. R. 9 C. P. 692; 43 L. J. C. P. 344.

(*t*) *Per* Bayley, J., *Simson* v. *Ingham*, 2 B. & C. 72; *Smith* v. *Wigley*, 3 Mo. & Sc. 174.

As to evidence of adoption of the liabilities of an old firm by the new copartnership, see *Rolfe* v. *Flower*, L. R. 1 P. C. 27.

(*x*) 1 Meriv. 608.

to other cases, as for instance, where in dealings between B. and C., the latter directs B. to receive monies due to him, the law will not presume an appropriation of these monies to the payment of a debt due to A. and B. in the absence of any specific directions" (*y*).

Payment by bill.

Where a bill of exchange or promissory note has been given by a debtor to his creditor, it is not unfrequently a matter of some difficulty to determine whether the giving of such instrument should be considered as payment, and as operating to extinguish the original debt; or whether it should be regarded merely as security for its payment, and as postponing the period of payment until the bill or note becomes due. Upon this subject, which is one of great practical importance, the correct rule is thus laid down by Lord *Langdale*, M. R.:—"The debt," says his Lordship, "may be considered as actually paid if the creditor, at the time of receiving the note, has agreed to take it in payment of the debt, and to take upon himself the risk of the note being paid; or if, from the conduct of the creditor, or the special circumstances of the case, such a payment is legally to be implied. But in the absence of any special circumstances, throwing the risk of the note upon the creditor, his receiving the note in lieu of present payment of the debt, is no more than giving extended credit, postponing the demand for immediate payment, or giving time for payment on a future day, in consideration of receiving this species of security. Whilst the time runs, payment cannot legally be enforced, but the debt continues till payment is actually made; and if payment be not made when the time has run out, payment of the debt may be

(*y*) *Per* Lord Brougham, C., *Nottidge* v. *Prichard*, 2 Cl. & Fin. 393.

enforced as if the note had not been given. If payment be made at or before the expiration of the extended time allowed, it is then for the first time that the debt is paid" (*z*).

QUI PER ALIUM FACIT PER SEIPSUM FACERE VIDETUR. (*Co. Litt.* 258. *a.*)—*He who does an act through the medium of another party is in law considered as doing it himself.*

General rule.

The above maxim enunciates the general doctrine on which the law relative to the rights and liabilities of principal and agent depends. It can, however, in this volume be but briefly and cursorily considered.

Where a contract is entered into with A., *as agent for* B., it is deemed, in contemplation of law, to have been entered into with B., and the principal is, in most cases, the proper party to sue (*a*) or be sued for a breach of such contract,—the agent being viewed simply as the medium through which it was effected (*b*): *Qui facit per alium facit per se.*

(*z*) *Sayer* v. *Wagstaff*, 5 Beav. 415; *In re London, Birmingham and South Staffordshire Bank, Ld.*, 34 L. J. Ch. 418; *In re Harries*, 13 M. & W. 3; *per* Lord Kenyon, C.J., *Stedman* v. *Gooch*, 1 Esp. 5; Cited 6 Scott, N. R. 945. See, also, as to what may amount to or constitute payment, *Turney* v. *Dodwell*, 3 E. & B. 136; *Thomas* v. *Cross*, 7 Exch. 728, 732; *Underwood* v. *Nicholls*, 17 C. B. 239; *Pollard* v. *Ogden*, 2 E. & B. 459; *per* Erle, C.J., *Martin* v. *Reid*, 11 C. B. N. S. 735: *Wright* v. *Hickling*, L. R. 2 C. P. 199.

(*a*) To entitle a person to sue upon a contract it must be shown that he himself made it, or that the contract was made on his behalf by an agent authorised to act for him at the time, or whose act has been subsequently ratified and adopted by him: *Watson* v. *Swann*, 11 C. B. N. S. 756.

(*b*) Thus, in *Depperman* v. *Hubbersty*, 17 Q. B. 766, Coleridge, J., observes: "Here an avowed agent of a principal sues another avowed agent

Examples of rule.

The following instances, which are of ordinary occurrence and practical importance, may be mentioned as illustrative of the rule, which, for certain purposes, identifies the agent with the principal:—

Payment to agent.

Payment to an authorized agent (*c*), as an auctioneer, in the regular course of his employment (*d*), is payment to his principal (*e*), and generally payment to an agent if made in the ordinary course of business, will operate as payment to the principal (*f*), but such payment in the absence of any custom of trade to the contrary must be made in *cash* (*g*); if made by a bill, cheque, or note, it may be a good payment if such bill is subsequently honoured, or the cheque or note paid (*h*).

Payment by a principal to his agent, when good against creditor.

As incidentally arising out of the subject under discussion may be considered the position of a principal between whose agent and the creditor the contract or

of the same principal; and the action must fail for want of privity of contract between the two parties to the suit." See *Lee* v. *Everest*, 2 H. & N. 285, 291; *Coombs* v. *Bristol and Exeter R. C.*, 3 H. & N. 1.

(*c*) *Bostock* v. *Hume*, 8 Scott, N. R. 590.

(*d*) See *Mews* v. *Carr*, 1 H. & N. 484.

(*e*) *Sykes* v. *Giles*, 5 M. & W. 645; approved in *Williams* v. *Evans*, L. R. 1 Q. B. 352 (which shows that an auctioneer has no authority to receive payment by a bill of exchange).

"The general rule of law is, that where a creditor's agent is bound to pay the whole amount over to the principal, he must receive it in cash from the debtor; and that a person who pays such agent, and who wishes to be safe, must see that the mode of payment does enable the agent to perform this his duty. *Per* Bovill, C.J. *Bridges* v. *Garrett*, L. R. 4 C. P. 587-8, and cases there cited.

See *Catterall* v. *Hindle*, L. R. 2 C. P. 368; *Stephens* v. *Badcock*, 3 B. & Ad. 354; cited, Arg., *Whyte* v. *Rose*, 3. Q. B. 493; *Parrott* v. *Anderson*, 7 Exch. 93.

(*f*) *Williams* v. *Deacon*, 4 Ex. 397; *Underwood* v. *Nicholls*, 17 C. B. 239.

(*g*) *Barker* v. *Greenwood*, 2 Y. & C. (Ex. R.) 414, 419; *Sweeting* v. *Pearce*, 9 C. B. N. S. 534; 30 L. J. C. P. 109 Exch. Ch.

(*h*) *Bridges* v. *Garrett*, L. R. 5 C. P. 456; *per* Blackburn, J.; *Williams* v. *Evans*, L. R. 1 Q. B. 352-4.

agreement has been made, out of which the debt arises. If the creditor has given credit to the agent as a principal, and he is ignorant of the existence of a principal behind the agent, payment by the principal to his agent seems a good answer to a claim by the creditor on the former (*i*).

If, on the other hand, the creditor knows that the person with whom he makes the bargain is acting for a principal, whether disclosed or undisclosed, payment by the principal to his agent will not discharge him as regards the creditor, unless before such payment the latter has by his conduct induced the debtor to believe that he (the creditor) has already been paid by the agent (*k*).

Tender.

The receipt of money by an authorised agent will charge the principal (*l*), and in like manner, a tender made to an authorised agent will in law be regarded as made to the principal;—thus, where the evidence showed that the plaintiff directed his clerk not to receive certain money from his debtor if it should be offered to him, that the money was offered to the clerk, and that he, in pursuance of his master's orders, refused to receive it; upon the principle *Qui facit per alium facit per se*, the tender to the servant was held to be a good tender to the master (*m*): Payment also by an agent as such is equivalent to payment by the principal. Where, for example, a covenant was "to pay or cause to be paid," it was held, that the breach was sufficiently assigned by stating that the defendant had not paid, without saying, "or caused to be paid;" for had the defendant caused to be paid, he had paid, and, in such a case, the payment might be

Payment by agent.

(*i*) *Armstrong* v. *Stokes*, L. R. 7 Q. B. 598; 41 L. J. Q. B. 253.

(*k*) *Irvine* v. *Watson*, 5 Q. B. D. 414; 49 L. J. Q. B. 531; *Davison* v. *Donaldson*, 9 Q. B. D. 623.

(*l*) See *Thompson* v. *Bell*, 10 Exch. 10.

(*m*) *Moffat* v. *Parsons*, 5 Taunt. 307.

pleaded in discharge (*n*). So payment to an agent, if made in the ordinary course of business, will operate as payment to the principal (*o*). On the same principle, the delivery of goods to a carrier's servant is a delivery of them to the carrier (*p*), and the delivery of a cheque to the agent of A. is a delivery to A. (*q*). Railway companies, moreover, are not to be placed in a different condition from all other carriers. They will be bound in the course of their business as carriers by the contract of the agent whom they put forward as having the management of that branch of their business. So that, where it appeared from the evidence, that certain goods were undoubtedly received by a railway company, for transmission on some contract or other, and that the only person spoken to respecting such transmission was the party stationed to receive and weigh the goods; it was held that this party must have an implied authority to contract for sending the goods, and that the company were consequently bound by that contract (*r*). It has been held, that the station-master of a railway company has not, though the general manager of the company has (*s*), implied authority to

Delivery of goods.

(*n*) *Gyse* v. *Ellis*, 1 Stra. 228.

(*o*) See *Williams* v. *Deacon*, 4 Exch. 397; *Kaye* v. *Brett*, 5 Exch. 269; *Parrott* v. *Anderson*, 7 Exch. 93; and cases cited *ante*, p. 778.

(*p*) *Dawes* v. *Peck*, 8 T. R. 330; *Brown* v. *Hodgson*, 2 Camp. 36; *per* Lord Ellenborough, C.J., *Griffin* v. *Langfield*, 3 Camp. 254; *Fragano* v. *Long*, 4 B. & C. 219; *Great Western R. C.* v. *Goodman*, 12 C. B. 313. Moreover, a delivery to the carrier may be in law a delivery to the consignee; see the above cases; *Dunlop* v. *Lambert*, 6 Cl. & Fin. 600, and cases cited in 3 Com. by Broom & Hadley, 161–3. But an acceptance by the carrier is not an acceptance by the consignee; *per* Parke, B., *Johnson* v. *Dodgson*, 2 M. & W. 656.

(*q*) *Samuel* v. *Green*, 10 Q. B. 262.

(*r*) *Pickford* v. *Grand Junction R. C.*, 12 M. & W. 766; *Heald* v. *Carey*, 11 C. B. 977.

(*s*) *Walker* v. *Great Western R. C.*, L. R. 2 Ex. 228.

bind the company by a contract for surgical attendance on an injured passenger (*t*).

Agent for sale of goods.

When an agent for the sale of goods contracts in his own name, and *as a principal*, the general rule is, that an action may be maintained, either in the name of the party by whom the contract was made, and privy to it, or of the party on whose behalf and for whose benefit it was made (*u*). Even when the agent is a factor, receiving a *del credere* commission, the principal may, at any period after the contract of sale has been concluded, demand payment of the sum agreed on to himself, unless such payment had previously been made to the factor, in due course, and according to the terms of the contract (*x*). The following rules, respecting the liability of parties on a contract for the purchase of goods, are likewise illustrative of the doctrine under consideration, and are here briefly stated on account of their general importance and applicability:—1st, an agent, contracting as principal, is liable in that character; and if the real principal be known to the vendor at the time of the contract being entered into by the agent, dealing in his own name, and credit be given to such agent, the latter only can be sued on the contract (*y*).

(*t*) *Cox* v. *Midland Counties R. C.*, 3 Exch. 268. See *Poulton* v. *London and South Western R. C.*, L. R. 2 Q. B. 534.

(*u*) *Per* Bayley, J., *Sargent* v. *Morris*, 3 B. & Ald. 280; *Sims* v. *Bond*, 5 B. & Ad. 393; *Duke of Norfolk* v. *Worthy*, 1 Camp. 337; *Cothay* v. *Fennell*, 10 B. & C. 672; *Bastable* v. *Poole*, 1 Cr. M. & R. 413; *per* Lord Abinger, C.B., 5 M. & W. 650; *Garrett* v. *Handley*, 4 B. & C. 656; distinguished in *Agacio* v. *Forbes*, 14 Moo., P. C. C., 160, 170, 171; see *Ramazotti* v. *Bowring*, 7 C. B. N. S. 851; *Ferrand* v. *Bischoffsheim*, 4 *Id.* 710; *Higgins* v. *Senior*, 8 M. & W. 844.

(*x*) *Hornby* v. *Lacy*, 6 M. & S. 172; *Morris* v. *Cleasby*, 4 M. & S. 566, 574; *Sadler* v. *Leigh*, 4 Camp. 195; *Grove* v. *Dubois*, 1 T. R. 112; *Scrimshire v. Alderton*, 2 Stra. 1182.

(*y*) *Paterson* v. *Gandasequi*, 15 East, 62; *Addison* v. *Gandasequi*, 4

2ndly, if the principal be unknown at the time of contracting, whether the agent represent himself as such or not, the vendor may, within a reasonable time after discovering the principal, debit either at his election (*z*). But, 3rdly, if a person act as agent without authority, he is personally and solely liable; and if he exceed his authority, the principal is not bound by acts done beyond the scope of his legitimate authority (*a*). If A. employs B. to work for C., without warrant from C., A. is liable to pay for the work done (*b*); nor would it in this case make any difference, if B. believed A. to be in truth the agent of C.; for, in order to charge the last-mentioned party, the plaintiff must prove a contract with him, either express or implied, and with him in the character of a principal, directly, or through the intervention of an agent (*c*).

The question, how far an agent is personally liable,

Taunt. 574; *Franklyn* v. *Lamond*, 4 C. B. 637. See *Smith* v. *Sleap*, 12 M. & W. 585, 588.

(*z*) *Thomson* v. *Davenport*, 9 B. & C. 78; cited *per* Martin, B., *Barber* v. *Pott*, 4 H. & N. 767; *Smethurst* v. *Mitchell*, 1 E. & E. 622, 631; *Heald* v. *Kenworthy*, 10 Exch. 734; *Risbourg* v. *Bruckner*, 3 C. B. N. S. 812; *per* Park, J., *Robinson* v. *Gleadow*, 2 Bing. N. C., 161, 162; *Paterson* v. *Gandasequi*, 15 East, 62; *Wilson* v. *Hart*, 7 Taunt. 295; *Higgins* v. *Senior*, 8 M. & W. 834; *Humfrey* v. *Dale*, 7 E. & B. 266; S. C., E. B. & E., 1004.

(*a*) *Woodin* v. *Burford*, 2 Cr. & M. 391; *Wilson* v. *Barthrop*, 2 M. & W. 863; *Fenn* v. *Harrison*, 3 T. R. 757; *Polhill* v. *Walter*, 3 B. & Ad. 114; *per* Lord Abinger, C.B., *Acey* v. *Fernie*, 7 M. & W. 154; *Davidson* v. *Stanley*, 3 Scott, N. R. 49; *Harper* v. *Williams*, 4 Q. B. 219. See *Downman* v. *Williams*, 7 Q. B. 103 (where the question was as to the construction of a written undertaking); *Cooke* v. *Wilson*, 1 C. B. N. S. 153; *Gillett* v. *Offor*, 18 C. B. 905; *Green* v. *Kopke*, *Id.* 549; *Parker* v. *Winlow*, 7 E. & B. 942, 949; *Wake* v. *Harrop*, 1 H. & C. 202; S. C., 6 H. & N. 768; *Oglesby* v. *Yglesias*, E. B. & E. 930; *Williamson* v. *Barton*, 7 H. & N. 899.

(*b*) *Per* Lord Holt, C.J., *Ashton* v. *Sherman*, Holt, R., 309; cited 2 M. & W. 218.

(*c*) *Thomas* v. *Edwards*, 2 M. & W. 215.

who, having in fact no authority, professes to bind his principal, has, on various occasions, been discussed. There is no doubt, it was observed in a modern judgment (*d*), that, in the case of a fraudulent misrepresentation of his authority, with an intention to deceive, the agent would be personally responsible (*e*); but, independently of this, which is perfectly free from doubt, there seem to be still two other classes of cases, in which an agent, who, without actual authority, makes a contract in the name of his principal, is personally liable, even where no proof of such fraudulent intention can be given. First, where he has no authority, and knows it, but nevertheless, makes the contract, as having such authority; in which case, on the plainest principles of justice, he is liable; for he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge; and it is but just, that he who does so should be considered as holding himself out as one having competent authority to contract, and as guaranteeing the consequences arising from any want of such authority. There is also a second class in which the Courts have held, that, where a party making the contract as agent, *bonâ fide* believes that such authority is vested in him, but has, in fact, no such authority, he is still personally liable. In these cases the agent is not indeed

(*d*) *Smout* v. *Ilbery*, 10 M. & W. 1, 9. In this case, which was an action of debt, a man, who has been in the habit of dealing with the plaintiff for meat supplied to his house, went abroad, leaving his wife and family resident in this country, and died abroad :—Held, that the wife was not liable for goods supplied to her after his death, but before information of his death had been received.

(*e*) "All persons directly concerned in the commission of a fraud are to be treated as principals. No party can be permitted to excuse himself on the ground that he acted as the agent or as the servant of another :" *per* Lord Westbury, C., *Cullen* v. *Thomson's Trustees*, 4 Macq. Sc. App. Cas. 432-3.

actuated by any fraudulent motives, nor has he made any statement which he knows to be untrue; but still, his liability depends on the same principles as before. It is a wrong, differing only in degree, but not in its essence, from the former case, to state as true, what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct, and, if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for its consequences. The true principle derivable from the cases is, that there must be some wrong or omission of right on the part of the agent, in order to make him personally liable on a contract made in the name of his principal; in all of them, it will be found that the agent has either been guilty of some fraud, has made some statement which he knew to be false, or has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party as would enable him, equally with himself, to judge as to the authority under which he proposed to act. *Polhill* v. *Walter* (*f*), which has been noticed in another page of this work, is an instance of the first of the two classes of decisions just alluded to; and cases, in which the agent never had any authority to contract at all, but believed that he had, as where he acted on a forged warrant of attorney, which

(*f*) 3 B. & Ad. 114; see also *Chapleo* v. *Brunswick Building Society*, 6 Q. B. D. 696; 50 L. J. Q. B. 372.

he thought to be genuine, and the like, are instances of the second class (*g*). To the various states of facts just put, we may add that if a person contracts *as agent* with another, he will in law be held to impliedly undertake and promise that he is what he represents himself to be, so that for any direct damage arising to the other party from a breach of such promise, he will, without proof of any fraudulent representation be responsible (*h*).

Partnership.

On the maxim, *Qui facit per alium facit per se*, depends also the liability of a co-partnership on a contract entered into by an individual member of the firm; for the law as to partnership, as has been observed (*i*), is a branch of the law of principal and agent; a partner embraces both characters, and his act or assurance if made with reference to business transacted by the firm (*k*), within the scope of his authority (*l*), and in the absence of collusion between himself and the other contracting party (*m*), will bind his co-partners.

Marsh v. *Keating*.

The decision in *Marsh* v. *Keating* (*n*), is important with reference to the question of the responsibility in-

(*g*) Judgm., 10 M. & W. 10.

(*h*) *Collen* v. *Wright*, 7 E. & B. 301; S. C., 8 *Id.* 647 (with which compare *Randell* v. *Trimen*, 18 C. B. 786). *Spedding* v. *Nevell*, L. R. 4 C. P. 212; *Simons* v. *Patchett*, 7 E. & B. 568.

(*i*) *Mollwo, March & Co.* v. *The Ct. of Wards*, L. R. 4 P. C. C. 419; *Pooley* v. *Driver*, 5 Ch. Div. 560; 46 L. J. Ch. 466.

(*k*) *Per* Abbott, C.J., *Sandilands* v. *Marsh*, 2 B. & Ald. 678; *per* Lord Wensleydale, *Ernest* v. *Nicholls*, 6 H. L. Cas. 417, 418; and in *Cox* v. *Hickman*, 8 H. L. Cas. 268, 304, 312; *Waugh* v. *Carver*, 2 H. Bla. 235; Judgm., 1 My. & K. 76; *Bullen* v. *Sharp*, L. R. 1 C. P. 86.

The stat. 28 & 29 Vict. c. 86, has materially limited partnership liability at common law.

(*l*) *Forster* v. *Mackreth*, L. R. 2 Ex. 163; *Ellston* v. *Deacon*, L. R. 2 C. P. 20.

(*m*) *Per* Bayley, J., *Vere* v. *Ashby*, 10 B. & C. 296; *Wintle* v. *Crowther*, 1 Cr. & J. 316; *Bond* v. *Gibson*, 1 Camp. 185; *Lewis* v. *Reilly*, 1 Q. B. 349.

(*n*) 2 Cl. & F. 250.

curred by one partner for the act of his co-partner, by reason of the implied agency between parties thus situated, and affords a direct and forcible illustration of the maxim, *Qui facit per alium facit per se:* in the case referred to the facts were, that F., a partner in a banking firm, caused stock belonging to a customer to be sold out under a forged power of attorney, the proceeds were paid to the account of the bank at the house of the bank's agent's, and were appropriated by F. to his own purposes. F. was afterwards executed for other forgeries. It appeared from the special verdict, that F.'s partners were ignorant of the fraud, but might, with common diligence, have known it; and it was held by the House of Lords, in conformity with the unanimous opinion of the Judges, that the customer could maintain an action against the partners for money had and received. The general proposition, it was observed, was not disputed, that if the goods of A. are wrongfully taken and sold, the owner may bring trover against the wrong-doer, or may elect to consider him as his agent—may adopt the sale and maintain an action for the price; and this general rule was held applicable to fix the innocent partners with liability under the circumstances disclosed upon the special verdict.

General remarks as to agency.

Without attempting to enter at length upon the subject of partnership liabilities, incurred through the act of an individual member of the firm, we may observe, that wherever a contract is alleged to have been entered into through the medium of a third person, whether a co-partner or not, the real and substantial question is, with whom was the contract made? and, in answering this question, the jury will have to consider whether the party through whose instrumentality the contract

is alleged to have been made, had in fact authority to make it. "It would," moreover, "be very dangerous to hold," as matter of law, "that a person who allows an agent to act as a principal in carrying on a business, and invests him with an apparent authority to enter into contracts incidental to it, could limit that authority by a secret reservation" (*o*).

Assumpsit for work and labour, in writing certain literary articles, was brought against the defendants, whose names appeared as proprietors of a newspaper in the declaration filed under 6 & 7 Will. 4, c. 76; they had in fact ceased to be so before the contract was entered into, at which time L. was the sole proprietor; the jury found that the contract was made by L. on his own behalf, without any authority from the defendants; and also, that the plaintiff, when he supplied the articles in question, did not know the defendants to be proprietors; it was held, that, although the declaration above mentioned was, under the provisions of the stat. (s. 8), conclusive evidence of the fact that the defendants were proprietors, yet the real question was with whom the contract had been made, and that upon the finding of the jury the defendants were not liable (*p*).

Application of maxim to committeemen of railway companies.

In like manner, in the case of an action brought at suit of a creditor against a member of the managing or provisional committee of a railway or other company, the question of liability ordinarily resolves itself into the consideration, whether the defendant did or did not authorise the particular contract for which he is sought

(*o*) *Per* Mellor, J., *Edmunds* v. *Bushell*, L. R. 1 C. P. 97, 100.

As to the authority of an agent see *Howard* v. *Sheward*, L. R. 2 C. P. 148; *Baines* v. *Ewing*, L. R. 1 Ex. 320.

(*p*) *Holcroft* v. *Hoggins*, 2 C. B. 488.

Barnett v. *Lambert.*

to be made responsible; in *Barnett* v. *Lambert* (*q*) the defendant in answer to an application from the secretary of a railway company, consented, by letter, that his name should be placed on the list of its provisional committee. His name was accordingly published in the newspapers as a provisional committee-man, and it appeared that on one occasion he attended and acted as chairman at a meeting of the committee. It was held, that the defendant was liable for the price of stationery supplied by the plaintiff on the order of the secretary, and used by the committee after the date of his letter to the secretary,—the question for decision being one of fact, and matter of inference for the jury, to be drawn from the defendant's conduct, as showing that he had constituted the secretary his agent to pledge his credit for all such things as were necessary for the working of the committee, and to enable it to go on. "Where," observed *Alderson*, B., "a subscription has been made, and there is a fund, it is not so; because if you give money to a person to buy certain things with, the natural inference is, that you do not mean him to pledge your credit for them" (*r*).

Reynell v. *Lewis.*

In *Reynell* v. *Lewis* and *Wylde* v. *Hopkins* (*s*), decided shortly after *Barnett* v. *Lambert, supra,* the Court of Exchequer took occasion to lay down the principles applicable to cases falling within the particular class under

(*q*) 15 M. & W. 489, where *Todd* v. *Emly*, 8 M. & W. 505; *Flemyng* v. *Hector*, 2 M. & W. 172; and *Tredwen* v. *Bourne*, 6 M. & W. 461, were cited *per Cur.* As to the liability of a partner on a contract *prior* to his joining the concern, see *Beale* v. *Moule*, 10 Q. B. 976.

(*r*) *Higgins* v. *Hopkins*, 3 Exch. 163; *Burnside* v. *Dayrell*, *Id.* 224.

(*s*) 15 M. & W. 517; *Collingwood* v. *Berkeley*, 15 C. B. N. S. 145; *Cross* v. *Williams*, 7 H. & N. 675; *Barker* v. *Stead*, 16 L. J. C. P. 160.

consideration; and it may probably be better to give the substance of this judgment at some length, as it affords throughout important practical illustrations of that maxim, "which," in the words of *Tindal*, C. J. (*t*), "is of almost universal application,"—*Qui facit per alium facit per se.*

With whom was contrac made.

"The question," observed the Court, "in all cases in which the plaintiff seeks to fix the defendant with liability upon a contract, express or implied, is, whether such contract was made by the defendant, by himself or his agent, with the plaintiff or his agent, and this is a question of fact for the decision of the jury upon the evidence before them. The plaintiff, on whom the burthen of proof lies in all these cases, must, in order to recover against the defendant, show that he (the defendant) contracted *expressly* or *impliedly; expressly*, by making a contract with the plaintiff; *impliedly*, by giving an order to him under such circumstances as show that it was not to be gratuitously executed: and, if the contract was not made by the defendant personally, it must be proved that it was made by an agent of the defendant properly authorised (*u*), and that it was made as his contract. In these cases of actions against provisional committee-men of railways, it often happens that the contract is made by a third person, and the point to be decided is, whether that third person was an agent for the defendant for the purpose of making it, and made the contract as such (*x*). The agency may be constituted by an express limited authority to make such a contract, or a larger authority to make all falling

Agency, how constituted.

(*t*) 8 Scott, N. R. 830.

(*u*) See *Cooke* v. *Tonkin*, 9 Q. B. 936.

(*x*) See *Riley* v. *Packington*, L. R. 2 C. P. 536; *Maddick* v. *Marshall*, 17 C. B. N. S. 829; S. C., 16 *Id.* 387; *Burbidge* v. *Morris*, 3 H. & C. 664.

within the class or description to which it belongs, or a general authority to make any; or it may be proved by showing that such a relation existed between the parties as by law would create the authority, as, for instance, that of partners, by which relation, when complete, one becomes by law the agent of the other for all purposes necessary for carrying on their particular partnership, whether general or special, or usually belonging to it; or the relation of husband and wife, in which the law, under certain circumstances, considers the husband to make his wife an agent. In all these cases, if the agent in making the contract acts on that authority, the principal is bound by the contract, and the agent's contract is his contract but not otherwise. This agency may be created by the immediate act of the party, that is, by really giving the authority to the agent, or representing to him that he is to have it, or by constituting that relation to which the law attaches agency; or it may be created by the representation of the defendant to the plaintiff that the party making the contract is the agent of the defendant, or that such relation exists as to constitute him such; and if the plaintiff really makes the contract on the faith of the defendant's representation, the defendant is bound,—he is estopped from disputing the truth of it with respect to that contract; and the representation of an authority is, *quoad hoc*, precisely the same as a real authority given by the defendant to the supposed agent. This representation may be made directly to the plaintiff, or made publicly, so that it may be inferred to have reached him: and may be made by words and conduct. Upon none of these propositions is there, we apprehend, the slightest doubt, and the proper decision of all these questions depends upon the proper application of these principles to the facts of each

case, and the jury are to apply the rule with due assistance from the judge." In the course of the judgment from which we have already made so long an extract, the Court further observed, that an agreement to be a provisional committee-man is merely an agreement for carrying into effect the preliminary arrangements for petitioning Parliament for a bill, and thus promoting the scheme, but constitutes no agreement to share in profit or loss, which is the characteristic of a partnership, although if the provisional committee-man subsequently acts he will be responsible for his acts. They likewise remarked, that where the list of the provisional committee has appeared in a prospectus, published with the defendant's consent, knowledge, or sanction, the context of such prospectus must be examined, to see whether or not it contains any statement affecting his liability, as, for instance, the names of a managing committee, in which case it will be a question whether the meaning be that the acting committee shall take the whole management of the concern, to the exclusion of the provisional committee, or that the provisional committee-men have appointed the acting committee, or the majority of it, on their behalf and as their agents (*y*). In this latter case, moreover, it must further be considered whether the managing and delegated body is authorised to pledge the credit of the provisional committee, or is merely empowered to apply the funds subscribed to the liquidation of expenses incurred in the formation and carrying out of the concern (*z*).

(*y*) See Judgm., 15 M. & W. 530, 531; *Wilson* v. *Viscount Curzon*, *Id.* 532; *Williams* v. *Pigott*, 2 Exch. 201.

(*z*) *Dawson* v. *Morrison*, 16 L. J., C. P., 240; *Rennie* v. *Clarke*, 5 Exch. 292. See, also, as to the liability of a provisional committee-man, *Patrick* v. *Reynolds*, 1 C. B N. S. 727; or member of a com-

Master of ship.

The authority of the master of a ship is very large. Under the general authority which he has, he may make contracts and do all things necessary for the due and proper prosecution of the voyage in which the ship is engaged. But this authority does not usually extend to cases where the owner can himself personally interfere as in the home port or the port in which he has beforehand appointed an agent (*a*). He may make contracts to carry goods on freight, but cannot bind his owners by a contract to carry freight free. With regard also to goods put on board the ship, the master may sign a bill of lading, and acknowledge thereby the nature, quality, and condition of the goods; his authority, however, to give bills of lading being limited to such goods as have been put on board (*b*).

Agency of wife.

The authority of a wife to act as her husband's agent, and as such to pledge his credit for articles supplied, is a question of fact in all cases, but may be implied where the husband and wife are living together (the latter managing the house or establishment) and the wife has been in the habit of purchasing articles which the husband has subsequently paid for, provided the particular articles in question may be considered necessaries either for house-

mittee of visitors, *Moffatt* v. *Dickson*, 13 C. B. 543; *Kendall* v. *King*, 17 *Id.* 483, 508. As to the authority of a resident agent, or the directors of a mining company, to borrow money on the credit of the company, see *Ricketts* v. *Bennett*, 4 C. B. 686, and cases there cited; *Burmester* v. *Norris*, 6 Exch. 796.

(*a*) *Arthur* v. *Barton*. 6 M. & W. 188; *Gunn* v. *Roberts*, 43 L. J. C. P. 233.

(*b*) *Grant* v. *Norway*, 10 C. B. 665, 687; *Hubbersty* v. *Ward*, 8 Exch. 330; *Jessel* v. *Bath*, L. R. 2 Ex. 267; *Valieri* v. *Boyland*, L. R. 1 C. P. 382; *Barker* v. *Highley*, 15 C. B. N. S. 27. See, further, as to the authority of the master, or ship's husband, to pledge the owner's credit, *The Great Eastern*, L. R. 2 A. & E. 88; *The Karnak*, L. R. 2 P. C. 505.

hold purposes or for the wife herself, having regard to the station in life and style of living of the husband (*c*).

Sheriff.

To the general principle under consideration may also be referred the numerous decisions which establish that the sheriff is liable for an illegal or fraudulent act committed by his bailiff, even if he were not personally cognisant of the transaction (*d*); and such decisions are peculiarly illustrative of this principle, because there is a distinction to be noticed between the ordinary cases and those in which the illegal act is done under such circumstances as constitute the person committing it the special bailiff of the party at whose suit process is executed; as, where the attorney of the plaintiff in a cause, requested of the sheriff a particular officer, delivered the warrant to that officer, took him in his carriage to the scene of action, and there encouraged an illegal arrest; it was held, that the sheriff was not liable for a subsequent escape (*e*). Nor will the sheriff be liable if the wrong complained of be neither expressly sanctioned by him, nor impliedly committed by his authority; as, where the bailiff derived his authority, not from the sheriff, but from the plaintiff, at whose instigation he acted (*f*); and it is not competent to

(*c*) *Debenham* v. *Mellon*, 6 App. Cas. 24; 50 L. J. Q. B. 155.

(*d*) *Per* Ashhurst, J., *Woodgate* v. *Knatchbull*, 2 T. R. 154; *Gregory* v. *Cotterell*, 5 E. & B. 571; *Raphael* v. *Goodman*, 8 A. & E. 565; *Sturmy* v. *Smith*, 11 East, 25; *Price* v. *Peek*, 1 Bing., N. C., 380; *Crowder* v. *Long*, 8 B. & C. 602; *Smart* v. *Hutton*, 8 A. & E. 568, n. See *Peshall* v. *Layton*, 2 T. R. 712; *Thomas* v. *Pearse*, 5 Price, 578; *Jarmain* v. *Hooper*, 7 Scott, N. R., 663.

(*e*) *Doe* v. *Trye*, 5 Bing., N. C., 573; *Ford* v. *Leche*, 6 A. & E. 699; *Wright* v. *Child*, L. R. 1 Ex. 358; *Alderson* v. *Davenport*, 13 M. & W. 42; *per* Buller, J., *De Moranda* v. *Dunkin*, 4 T. R. 121; *Botten* v. *Tomlinson*, 16 L. J., C. P., 138.

(*f*) *Cook* v. *Palmer*, 6 B. & C. 39; *Crowder* v. *Long*, 8 B. & C. 598; *Tompkinson* v. *Russell*, 9 Price, 287; *Bowden* v. *Waithman*, 5 Moore, 183; *Stuart* v. *Whittaker*, R. & M. 310; *Higgins* v. *M'Adam*, 3 Y. & J. 1.

one whose act produces the misconduct of the bailiff, to say, that the act of the officer done in breach of his duty to the sheriff, and which he has himself induced, is the act of the sheriff (*g*).

Exceptions to rule.

But, notwithstanding the almost universal applicability of the legal maxim under consideration, cases may occur in which, by reason of the express provisions of the statute law, it will not apply; for instance, it was formerly held that, under the stat. 9 Geo. 4, c. 14, s. 1, an acknowledgment signed by an agent of the debtor would not revive a debt barred by the Statute of Limitations (*h*). But the law upon this point has been altered by the stat. 19 & 20 Vict. c. 97, s. 13.

Delegated authority.

Before terminating our remarks as to the legal consequences which flow from the relation of principal and agent in transactons founded upon contract, it becomes necessary to consider briefly a kindred principle of law which limits the operation of the maxim *Qui facit per alium facit per se*, and will, therefore, most properly be noticed in immediate connection with it: the principle to which we allude is this, that a *delegated authority cannot be redelegated—Delegata potestas non potest delegari* (*i*); or, as it is otherwise expressed, *Vicarius non habet vicarium* (*k*)—one agent cannot lawfully nominate or appoint another to perform the subject-matter of his agency (*l*). This rule applies wherever the authority

(*g*) *Per* Bayley, J., 8 B. & C. 603, 604.

(*h*) *Hyde* v. *Johnson*, 2 Bing., N. C. 776. See, also, *Toms*, app., *Cuming*, resp., 8 Scott, N. R., 910; *Cuming*, app., *Toms*, resp., *Id.* 827; *Davies*, app., *Hopkins*, resp., 3 C. B. N. S. 376.

(*i*) 2 Inst. 597; Arg., *Fector* v. *Beacon*, 5 Bing., N. C. 310.

(*k*) Branch, Max., 5th ed., 380.

(*l*) See *per* Lord Denman, C. J., *Cobb* v. *Becke*, 6 Q. B. 936; *Combes' case*, 9 Rep. 75. See *Reg.* v. *Newmarket R. C.*, 15 Q. B. 702; *Reg.* v. *Dulwich College*, 17 Q. B. 600,

involves a trust or discretion in the agent for the exercise of which he is selected; but does not apply if it involves no matter of discretion, and it be immaterial whether the act be done by one person or another, and the original agent remains responsible to the principal (*m*). So, a principal employs a broker from the opinion which he entertains of his personal skill and integrity; and the broker has no right, without notice, to turn his principal, over to another, of whom he knows nothing; and, therefore, a broker cannot, without authority from his principal, transfer consignments made to him, in his character of broker, to another broker for sale (*n*). On the same principle, where an Act of Parliament for building a bridge required, that, when any notice was to be given by the trustees appointed and acting under it, such notice should be in writing or in print, signed by three or more of the trustees; it was held, that a notice, signed with the names of the clerks to the trustees, but signed, in fact, not by such clerks, but by a clerk employed by them, was insufficient, as being an attempt to substitute for a deputy his deputy (*o*). But where the act is purely ministerial, as for example, the signing of a name, the discretionary part of the agency having been exercised by the proper party to whom it was entrusted, it may in general be

615, where Lord Campbell, C. J., incidentally observes that "the Crown cannot enable a man to appoint magistrates."

(*m*) See Leake on Contracts, pp. 482–3, and *Hemming* v. *Hale*, 7 C. B. N. S. 498; see as slightly bearing on the question, *Johnson* v. *Rayl-ton*, 7 Q. B. D. 438; 50 L. J., Q. B. 753.

(*n*) *Cockran* v. *Irlam*, 2 M. & S. 301, n. (*a*); *Solly* v. *Rathbone*, *Id.* 298; *Catlin* v. *Bell*, 4 Camp. 183; *Schmaling* v. *Thomlinson*, 6 Taunt. 147; *Coles* v. *Trecothick*, 9 Ves. 251; *Henderson* v. *Barnwall*, 1 Yo. & J. 387.

(*o*) *Miles* v. *Bough*, 3 Q. B. 845; cited, Arg., *Allan*, app., *Waterhouse*, resp., 8 Scott, N. R. 68, 76.

delegated to and performed by the hand of another (*p*); and an agent can employ another in respect of such acts as are usually and in the ordinary course of the business for which the agent is employed, done by others (*q*), or which the agent must necessarily do through the agency of other persons (*r*).

It may, likewise, be well to observe, that delegated jurisdiction, as contradistinguished from proper jurisdiction, is that which is communicated by a judge to some other person, who acts in his name, and is called a deputy; and this jurisdiction is, in law, held to be that of the judge who appoints the substitute, or deputy, and not of the latter party; and in this case the maxim holds, *Delegatus non potest delegare*—the person to whom any office or duty is delegated,—for example, an arbitrator,—cannot lawfully devolve the duty on another, unless he be expressly authorised so to do (*s*). Nor can an individual, clothed with judicial functions, delegate the discharge of those functions to another, unless, as in the case of a County Court judge, he be expressly empowered to do so under specified circumstances (*t*). For the ordinary rule is that although a *ministerial* officer may appoint a deputy, a *judicial* officer cannot (*u*).

(*p*) Leake on Contracts, p. 483; *Johnson* v. *Osenton*, L. R., 4 Ex. 107; 38 L. J., Ex. 76.

(*q*) Leake on Contracts, 483; *Ex parte Sutton*, 2 Cox, Eq. Cas. 84.

(*r*) *Rossiter* v. *The Trafalgar Life Ass. Association*, 27 Beav. 377.

(*s*) See Bell, Dict. and Dig. of Scotch Law, 280, 281, 292; *Whitmore* v. *Smith*, 7 H. & N. 509; cited in *Thorburn* v. *Barnes*, L. R. 2 C. P. 384, 404; *Little* v. *Newton*, 2 Scott, N. R. 509; *Reg.* v. *Jones*, 10 A. & E. 576; *Hughes* v. *Jones*, 1 B. & Ad. 388; *Wilson* v. *Thorpe*, 6 M. & W. 721; Argument, 5 Bing., N. C. 310; *White* v. *Sharpe*, 12 M. & W. 712; *Rutter* v. *Chapman*, 8 M. & W. 1. See *The case of the Masters' Clerks*. 1 Phill. 650. *Et vide Reg.* v. *Perkin*, 7 Q. B. 165; *Smeeton* v. *Collier*, 1 Exch. 457; *Sharp* v. *Nowell*, 6 C. B. 253; 17 & 18 Vict. c. 125, s. 14.

(*t*) See Broom, Pr. C. C. 2nd ed., 9.

(*u*) See *per* Parke, B., *Walsh* v.

A magistrate, as observed by Lord *Camden*, can have no assistant nor deputy to execute any part of his employment. The right is personal to himself, and a trust that he can no more delegate to another, than a justice of the peace can transfer his commission to his clerk (*x*).

Rule, how qualified.

Although, however, a deputy cannot, according to the above rule, transfer his entire powers to another, yet a deputy possessing general powers may, in many cases, constitute another person his servant or bailiff, for the purpose of doing some particular act; provided, of course, that such act be within the scope of his own legitimate authority.

For instance, the steward of a manor, with power to make a deputy, made B. his deputy, and B., by writing under his hand and seal, made C. his deputy, to the intent that he might take a surrender of G., of copyhold lands. It was held, that the surrender taken by C. was a good surrender (*y*); and Lord *Holt*, insisting upon the distinction above pointed out, compared the case before him to that of an undersheriff, who has power to make bailiffs and to send process all over the kingdom, and that only by virtue of his deputation (*z*).

The rule as to delegated functions must, moreover, be understood with this necessary qualification, that, in the particular case, no power to re-delegate such functions has been given (*a*). Such an authority to employ a deputy may be either *express* or *implied* by the recognised usage of trade; as in the case of an architect or builder, who

Southworth, 6 Exch. 150, 156; which illustrates the former part of the rule stated *supra*. See *Baker* v. *Cave*, 1 H. & N. 674.

(*x*) *Entick* v. *Carrington*, 19 Howell, St. Trials, 1063.

(*y*) *Parker* v. *Kett*, 1 Ld. Raym. 658, cited in *Bridges* v. *Garrett*, L. R. 4 C. P. 591.

(*z*) 1 Ld. Raym. 659; *Leak* v. *Howell*, Cro. Eliz. 533.

(*a*) See 2 Prest. Abs. Tit. 276.

employs a surveyor to make out the quantities of the building proposed to be erected; in which case the maxim of the civil law applies, *In contractis tacitè insunt quæ sunt moris et consuetudinis* (*b*)—terms which are in accordance with and warranted by custom and usage may, in some cases, be tacitly imported into contracts (*c*).

RESPONDEAT SUPERIOR. (4 *Inst.* 114)—*Let the principal be held responsible.*

Respective liability of master and servant.

The doctrine enunciated in this maxim has been carried in English law very far, and in the opinion of a learned judge, quite as far as it should be (*d*). It is more usually and appropriately applied to actions *ex delicto*, than to such as are founded in contract. Where, for instance, an agent commits a tortious act, under the direction or with the assent of his principal, each is liable at suit of the party injured: the agent is liable, because the authority of the principal cannot justify his wrongful act; and the person who directs the act to be done is likewise liable, according to the maxim, *Respondeat superior* (*e*). "If

(*b*) 3 Bing., N. C. 814, 818.

(*c*) *De Bussche* v. *Alt*, 8 Ch. Div. 286, at p. 310.

(*d*) *Per* Jessel, M. R., *Smith* v. *Keal*, 9 Q. B. D. 340, at p. 351; 51 L. J. Q. B. 487.

(*e*) 4 Inst. 114; *Sands* v. *Child*, 3 Lev. 352; *Jones* v. *Hart*, 1 Ld. Raym. 738; *Britton* v. *Cole*, 1 Salk. 408; *Gauntlett* v. *King*, 3 C. B. N. S. 59; *per* Littledale, J., *Laugher* v. *Pointer*, 5 B. & C. 559; *Perkins* v. *Smith*, 1 Wils. 328; cited, 1 Bing.. N. C. 418; *Stephens* v. *Elwall*, 4 M. & S. 259; Com. Dig., "*Trespass*" (C. 1). See *Collett* v. *Foster*, 2 H. & N. 356; *Bennett* v. *Bayes*, 5 H. & N. 391.

A person who deals with the goods of a testator, as agent of the executor, cannot be treated as executor *de son tort*, whether the will has been proved or not; *Sykes* v. *Sykes*, L. R. 5 C. P. 113.

the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it, though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful" (*f*); and "all persons directly concerned in the commission of a fraud are to be treated as principals" (*g*).

A railway company may be liable in trover for a conversion by their agent (*h*): the rule, indeed, so far as regards the method of applying the maxim before us, being the same between a private individual and a railway company as it is where the same matter is in dispute between two private individuals (*i*).

In the case of domestic servants, and such agents as are selected by the master, and appointed to perform any particular work, although, possibly, not in his immediate employ or under his direct or personal superintendence, the maxim, *Respondeat superior*, is also very often applicable.

"Upon the principle that *Qui facit per alium facit per se*," it was said, in a leading case upon this subject, "the master is responsible for the acts of his servant, and that person is undoubtedly liable who stood in the

(*f*) 1 Com., by Broom & Hadley, 518; *et vide, per* Platt, B., *Stevens* v. *Midland Counties R. C.*, 10 Exch. 356; *Eastern Counties R. C.* v. *Broom*, 6 Exch. 314.

(*g*) *Ante*, p. 783, n. (*e*).

Scrivener v. *Pask*, L. R. 1 C. P. 715, 719, shows that to charge a principal for the misrepresentation of his agent, three things must be proved: (1) the agency; (2) that the agent was guilty of fraud or misrepresentation; and (3) that the principal knew of and sanctioned it. (*Sed* query as to (3) if the principal has in fact benefited by the misrepresentation.)

The intentional concealment of a material fact from the underwriter by the agent of the shipowner, though unknown to the last-mentioned party, will vitiate the policy; *Proudfoot* v. *Montefiore*, L. R. 2 Q. B. 511.

(*h*) *Taff Vale R. C.* v. *Giles*, 2 E. & B. 822. See *Poulton* v. *London and South Western R. C.*, L. R. 2 Q. B. 534.

(*i*) *Roe* v. *Birkenhead, Lancashire and Cheshire R. C.*, 7 Exch. 36, 40.

relation of master to the wrongdoer—he who had selected him as his servant, from the knowledge of, or belief in, his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey, and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorised by him to appoint servants for him, can make no difference" (*k*).

Owner of ship.

Where, for instance, a man is the owner of a ship, he himself appoints the master, and desires the master to appoint and select the crew: the crew thus become appointed by the owner, and are his servants for the management and government of the ship, and if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself (*l*). By a policy of insurance, however, the assured makes no warranty to the underwriters that the master and crew shall do their duty during the voyage; and their negligence or misconduct is no defence to an action on the policy, where the loss has been immediately occasioned by the perils insured against; nor can any distinction be made in this respect between the omission by the master and crew to do an act which ought to be done, and the doing an act which ought not to be done, in the course of the navigation (*m*). In the case just supposed, however, if the ship be chartered for the particular voyage, or for a definite period, it is

(*k*) *Quarman* v. *Burnett*, 6 M. & W. 509; cited L. R., 1 H. L. 114; *Tobin* v. *Reg.* 16 C. B. N. S. 350.

(*l*) *Per* Littledale, J., 5 B. & C. 554; *Martin* v. *Temperley*, 4 Q. B. 298; *Dunford* v. *Trattles*, 12 M. & W. 529; *Bland* v. *Ross*, 14 Moo. P. C. C. 210.

(*m*) Judgm., *Dixon* v. *Sadler*, 5 M. & W; 414; cited in *The Ducro*, L. R. 2 A. & E. 393; *Biccard* v. *Shepherd*, 14 Moo. P. C. C. 471.

always a question of fact under whose direction and control the vessel was at the time of the occurrence complained of; and this question must be solved by ascertaining whose are the crew, and by considering whether the reasonable interpretation of the charter-party is, that the owners meant to keep the control of the vessel in their own hands, or to make the freighter the responsible owner *pro tempore* (*n*): and a state of facts might perhaps occur in which the charterer would be answerable as well as the owner (*o*).

Principle of rule.

"The principle upon which a master is in general liable to answer for accidents resulting from the negligence or unskilfulness of his servant, is, that the act of his servant is in truth his own act (*p*). If the master is himself driving his carriage, and from want of skill causes injury to a passer-by, he is of course responsible for that want of skill. If, instead of driving the carriage with his own hands, he employs his servant to drive it, the servant is but an instrument set in motion by the master. It was

(*n*) *Fenton* v. *City of Dublin Steam Packet Co.*, 8 A. & E. 835; *Dalyell* v. *Tyrer*, E. B. & E. 899; *Fletcher* v. *Braddick*, 2 N. R. 182; recognised, 5 B. & C. 556; *Newberry* v. *Colvin*, 7 Bing. 190; cited Judgm. *Schuster* v. *M'Kellar*, 7 E. & B. 724; *Trinity House* v. *Clark*, 4 M. & S. 288; *Sandeman* v. *Scurr*, L. R. 2 Q. B. 86.

(*o*) *Per* Lord Denman, C. J., and Patteson, J., 8 A. & E. 842, 843.

As to the owner's liability in trover for the act of the master, see *Ewbank* v. *Nutting*, 7 C. B. 797.

As to the liability of the master for damage done to goods in the loading thereof, see *Blaikie* v. *Stembridge*, 6 C. B. N. S. 894 (distinguished in *Sack* v. *Ford*, 13 C. B. N. S. 90); *Sandeman* v. *Scurr*, L. R. 2 Q. B. 86.

(*p*) So in *Lumley* v. *Gye*, 22 L. J., Q. B. 478; S. C., 2 E. & B. 216, Coleridge, J., observes, "The maxims *Qui facit per alium facit per se*, and *Respondeat superior*, are unquestionable; but where they apply, the wrongful act is properly charged to be the act of him who has procured it to be done; he is sued as a principal trespasser, and the damage, if proved, flows directly and immediately from his act, though it was the hand of another—and he a free agent—that was employed."

the master's will that the servant should drive, and whatever the servant does in order to give effect to his master's will may be treated by others as the act of the master, *Qui facit per alium facit per se*" (*q*). The general rule being that "a master is responsible for all acts done by his servant in the course of his employment, though without particular directions" (*r*); even whilst engaged in private business of his own, provided he be at the time engaged generally on that of his master (*s*). Thus, where the defendant let out a horse and cab to a driver upon general terms as to their management in obtaining fares, and the driver when about to enter the mews in which the horse and cab were kept, drove back to a shop for the purpose of getting some snuff for himself, and on his return drove over the plaintiff, the plaintiff was held entitled to recover as against the defendant, it being held, first, that under the provisions of certain Acts of Parliament (*t*) the relationship of master and servant existed between the defendant and the driver, and secondly, that the latter at the time of the accident was acting within the scope of his general employment in the sense that he was not doing anything in contravention of the terms upon which the horse and cab were entrusted to him (*u*).

(*q*) Judgm., *Hutchinson* v. *York, Newcastle, and Berwick R. C.*, 5 Exch. 350. See *Sharrod* v. *The London and North Western R. C.*, 4 Exch. 580, 585; citing *Gregory* v. *Piper*, 9 B. & C. 591.

(*r*) *Per* Lord Holt, C. J., *Tuberville* v. *Stampe*, 1 Lord Raym. 265; *Seymour* v. *Greenwood*, 7 H. & N. 355, 357–8; S. C., 6 *Id.* 359.

(*s*) *Patten* v. *Rea*, 2 C. B. N. S. 606; *Mitchell* v. *Crassweller*, 13 C. B. 237; *Storey* v. *Ashton*, L. R. 4 Q. B. 476; Judgm., *Tobin* v. *Reg.*, 16 C. B. N. S. 350–352.

The same principle applies to fix a corporation aggregate with liability; *Green* v. *London General Omnibus Co.*, 7 C. B. N. S. 290.

(*t*) 6 & 7 Vict. c. 86.

(*u*) *Venables* v. *Smith*, 2 Q. B. D.

Tests of liability.

The tests applicable for determining the liability of the master being—is the servant "*in the employ* of his master at the time of committing the grievance?" (*x*)—and was he acting within the scope of his employment at the time he did the act complained of?—where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable even though the acts done may be the very reverse of that which the servant was actually directed to do (*y*). Whether the act done was or was not within the scope of the servant's employment is a question of fact, and if the case be tried by a jury should be left for their determination (*z*). "The master," observes *Maule*, J. (*a*), "is liable even though the servant in the performance of his duty is guilty of a deviation or a failure to perform it in the strictest and most convenient manner. But where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of the servant in doing it."

A master may also be civilly responsible for the fraud of his servant acting in the course of his employment (*b*). And "where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accom-

279; 46 L. J., Q. B. 470, 522; *King* v. *Spurr*, 30 W. R. 151.

(*x*) *Per* Jervis, C.J., 13 C. B. 246; *Storey* v. *Ashton*, *supra*.

(*y*) *Bayley* v. *Manchester*, *&c.*, *Railway Co.*, L. R. 8 C. P. 148; 42 L J. C. P. 78.

(*z*) *Bank of New South Wales* v. *Ouston*, 4 App. Cas. 270; 48 L. J. C. P. 25.

(*a*) 13 C. B. 247.

(*b*) *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259; approved in *Mackay* v. *Commercial Bank of New Brunswick*, L. R., 5 P. C. C. 394; 43 L. J. P. C. 84.

plished through the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation" (*c*).

If A. employs B. to do an illegal act, or an act necessarily to be done in an unlawful way, A. will be responsible to C., who sustains damage consequential on the act thus done, there being here the *injuria et damnum*, which suffice to constitute a cause of action (*d*).

Exceptions to rule.

It would seem that a master is not liable in trespass for the wilful act of his servant, if done for the servant's own purposes, and not in furtherance of the interests of his master; thus in *M'Manus* v. *Crickett* (*e*), the defendant's servant wilfully and without the direction or consent of his master drove the master's carriage against the plaintiff's chaise, the Court held the master not liable on the ground that the servant by his conduct gained a special property in the chariot for the time, which for that purpose became the servant's; and in a later case the Court laid down the principle, that if a servant in order to effect some purpose of his own wilfully does the act complained of, the master is not liable, but if in order to carry out his master's orders (or as it is submitted in

(*c*) *Per* Lord Cranworth, C., *Ranger* v. *Great Western R. C.*, 5 H. L. Cas. 86, 87.

(*d*) *Ellis* v. *Sheffield Gas Consumers' Co.*, 2 E. & B. 767, and *Hole* v. *Sittingbourne and Sheerness R. C.*, 6 H. & N. 488; cited in *Pickard* v. *Smith*, 10 C. B. N. S. 470. See *Gray* v. *Pullen*, 5 B. & S. 970; *Peachey* v. *Rowland*, 13 C. B. 187; *Sadler* v. *Henlock*, 4 E. & B. 570; *Gayford* v. *Nicholls*, 9 Exch. 702; *Newton* v. *Ellis*, 5 E. & B. 115; *Ward* v. *Lee*, 7 E. & B. 426.

(*e*) 1 East, 106.

furtherance of his master's interests) (*f*) he does the same act the master will be liable (*g*) because the master has put the servant in his own place, and the act is done in pursuance of the servant's employment (*h*). Neither does the rule apply where the relationship existing between the parties has terminated before the commission of the act complained of. Thus, the sheriff is not liable in trover for a conversion by his bailiff of goods seized under process of attachment issuing out of the county court after the bailiff has had notice of a *supersedeas*. The ground of the sheriff's liability for the acts of his bailiff is, that he is casting upon another a duty which the law imposes upon him, and, consequently, that he is acting by a servant; but the effect of the *supersedeas* is to render the writ inoperative from the moment it was delivered to the sheriff, and not the writ only, but the warrant also; and the consequence is, that, though the sheriff was responsible for everything that was done up to the time of the *supersedeas*, yet that which was done afterwards was done in defiance of his authority, and to hold him liable for this would be holding him to be a wrong-doer for the act of his servant *after* his authority had been determined (*i*).

The liability of the master for the tort of the servant when acting under his implied authority results, then, as above stated, from the fact, that servants are hired and

(*f*) *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 520; 32 L. J. Ex. 34.

(*g*) *Croft* v. *Alison*, 4 B. & Ald. 590.

(*h*) *Seymour* v. *Greenwood*, 1 H. & N. 355; 30 L. J. Ex. 327.

(*i*) *Brown* v. *Copley*, 8 Scott, N. R. 350. The ground and extent of the sheriff's liability are explained, *per* Jervis, C.J., *Gregory* v. *Cotterell*, 5 E. & B. 584; *per* Maule, J., *Smith* v. *Pritchard*, 8 C. B. 588; *Woods* v. *Finnis*, 7 Exch. 363; *Hooper* v. *Lane*, 6 H. L. Cas. 443.

selected by the master to do the business required of them, and their acts consequently stand on the same footing as his own (*k*); as in the case of coach proprietors, who are answerable for an injury sustained by a passenger through the driver's misconduct (*l*). A difficulty, however, often arises in applying this general and fundamental rule to particular facts, and in determining between what parties the relationship of master and servant actually subsists (*m*); for, although that party will usually be liable with whom the act complained of ultimately originates, yet the applicability of this test fails in one case; for where he who does the injury (either in person or by his servant) exercises an *independent* employment, the party employing him is clearly not liable (*n*): the general rule appearing to be that one employing another is not liable for his collateral negligence unless the relation of master and servant exist between them, thus in the instance of a butcher who employs a drover, whose deputy does the mischief by his careless driving (*o*); or of a builder who contracts to make certain alterations in a club-house, together with the necessary gas-fittings, and who employs a gas-fitter for the latter purpose under a sub-contract, through the negligence of whom, or of whose servants, the plaintiff sustains an injury (*p*). But to

(*k*) *Per* Littledale, J., *Laugher* v. *Pointer*, 5 B. & C. 553, 554.

(*l*) *White* v. *Boulton*, Peake, N. P. C. 81; *Jackson* v. *Tollett*, 2 Stark., N. P. C., 37. See the cases 2 Selw., N. P., 12th-ed., 446, 1119.

(*m*) As between pilot and owner of ship, captain of ship and inferior officer, *Nicholson* v. *Mouncey*, 15 East, 384, and cases there cited; postmaster-general and clerk, *Lane* v. *Cotton*, 1 Salk. 17; S. C., 15 Mod. 472; *per* Lord Ellenborough, C.J., 15 East, 392; *Whitfield* v. *Lord Despencer*, Cowp. 754; cited *per* Lord Wensleydale, L. R. 1 H. L. 111, 124.

(*n*) *Per* Williams, J., and Coleridge, J., 12 A. & E. 742; *Gray* v. *Pullen*, 5 B. & S. 970.

(*o*) *Milligan* v. *Wedge*, 12 A. & E. 737.

(*p*) *Rapson* v. *Cubitt*, 9 M. & W. 710. See *Wilson* v. *Peto*, 6 Moore,

this rule there is an exception which has been clearly recognised in recent times, namely, that where a person employs a contractor to do a particular thing, the doing of which casts a duty on the employer, the latter cannot escape from his responsibility by delegating the doing of the thing to another. It is difficult to state exhaustively the instances in which this duty arises. It is clear on the one hand that if A. orders B. to do a particular thing which may cause a nuisance to his neighbour, a duty arises on B.'s part to see that the nuisance is not created; again, if A. contracts with B. that B. shall do a thing dangerous or calculated to be dangerous to A.'s neighbour, a duty equally arises on A.'s part to see that the danger is avoided. The test would seem to be: Was the act which occasioned the injury one which the contractor was employed to do, or was the contractor intrusted with the performance of a duty incumbent upon his employer? in both instances the employer will be liable for the acts or omissions of the contractor to the same extent as though the latter had been his servant (*q*). Thus, where an Act of Parliament authorized the cutting of a trench by the defendants across a highway, but attached to the exercise of the right the condition of filling up the trench after the drain had been completed, and the defendant employed a contractor to do the work who was negligent in its performance by improperly filling up the trench, whereby the plaintiff was injured, the Exchequer Chamber held the defendants liable on the

47; *Witte* v. *Hague*, 2 D. & R. 33.

(*q*) *Pickard* v. *Smith*, 10 C. B. N. S. 470; *Grey* v. *Pullen*, 5 B. & S. 970; 32 L. J. Q. B. 169; *Bower* v. *Peate*, 1 Q. B. D. 321; 45 L. J. Q. B. 446; *Dalton* v. *Angus*, 6 App. Cas. 740, at p. 829; *Percival* v. *Hughes*, 9 Q. B. D. 441; 8 App. Cas. 443; 52 L. J. Q. B. 719; and see *Daniell* v. *Directors of Metropolitan Railway Co.*, L. R. 5 H. L. 45.

ground that a duty was cast on them to see that the trench was properly filled up, and that the defendants could not escape from liability by delegating the duty to another who omitted to perform it. The Court appears to have drawn an important distinction between an omission of a duty cast upon the employer and to be performed by the contractor, and the commission of a wrongful act done by a contractor in the course of, but not according to, his contract; in the latter case the employer would not be liable.

It is, however, obviously not essential "that the relation of principal and agent in the sense of one commanding and the other obeying should subsist in order to make one responsible for the tortious act of another: it is enough if it be shown to have been by his procurement and with his assent. The cases where the liability of one for the wrongful act of another has turned upon the relation of principal and agent are quite consistent with the party's liability, irrespective of any such relation: as if I agree with a builder to build me a house, according to a certain plan, he would be an independent contractor, and I should not be liable to strangers for any wrongful act unnecessarily done by him in the performance of his work, but clearly I should be jointly liable with him for a trespass on the land if it turned out that I had no right to build upon it" (*r*).

A railway company entered into a contract with A. to construct a portion of their line. A. contracted with B., who resided in the country, to erect a bridge on the line. B. had in his employment C., who acted as his general servant, and as a surveyor, and had the management of

(*r*) *Per* Willes, J., *Upton* v. *Townend*, 17 C. B. 71.

B.'s business in London, for which he received an annual salary. B. entered into a contract with C., by which C. agreed for £40 to erect a scaffold, which had become necessary in the building of the bridge; but it was agreed that B. should find the requisite materials, and lamps, and other lights. The scaffold was erected upon the footway by C.'s workmen, a portion of it improperly projected, and owing to that and the want of sufficient light, D. fell over it at night, and was injured. After the accident, B. caused other lights to be placed near the spot, to prevent a recurrence of similar accidents.—Held, that an action was not maintainable by D. against B. for the injury thus occasioned (*s*).

Where the owner of a carriage hires horses of a stable-keeper, who provides a driver, through whose negligence an injury is done, the driver must be considered as the servant of the stable-keeper or job-master, against whom, consequently, the remedy must be taken; unless there be special circumstances showing an assent, either express or implied, to the tortious act, of the party hiring the horses, or showing that such party had control over the servant, and was in fact, *dominus pro tempore* (*t*).

Master not liable to ser-

The maxim, *Respondeat superior*, does not, moreover,

(*s*) *Knight* v. *Fox*, 5 Exch. 721 (distinguishing *Burgess* v. *Gray*, 1 C. B. 578); *Steel* v. *South Eastern R. C.*, 16 C. B. 550.

(*t*) The following cases may be referred to on this subject, which can only be briefly noticed in the text:—*M'Laughlin* v. *Pryor*, 4 Scott, N. R., 655; S. C., 1 Car. & M. 354; *Quarman* v. *Burnett*, 6 M. & W. 499; the judgments of Abbott, C.J., and Littledale, J., in *Laugher* v. *Pointer*, 5 B. & C. 547; *Dalyell* v. *Tyrer*, E., B. & E. 898; *Hart* v. *Crowley*, 12 A. & E. 378; *Taverner* v. *Little*, 5 Bing., N. C., 678; *Croft* v. *Alison* 4 B. & Ald. 590; Judgm., *Seymour* v. *Greenwood*, 7 H. & N. 358; S. C., 6 *Id.* 359; *Smith* v. *Lawrence*, 2 Man. & Ry. 1; *Sammell* v. *Wright*, 5 Esp., N. P. C., 263; *Scott* v. *Scott*, 2 Stark., N. P. C., 438; *Brady* v. *Giles*, 2 M. & Rob. 494; *per* Patteson, J., 8 A. & E. 839.

vant for damage caused by negligence of fellow-servant.

apart from the statute hereinafter mentioned, apply to make the master responsible to a servant who sustains bodily hurt whilst discharging the duties incidental to his employment, such hurt having been caused by his own carelessness or negligence (*u*), through a defect in machinery (*x*), or a deficiency of hands (*y*), of which the injured party must necessarily have been cognisant (*z*), or occasioned by the negligence of a fellow-servant, provided the master has been reasonably cautious in selecting as his associates persons possessed of ordinary skill and care (*a*). If A. and B. are fellow-servants of C., and by the unskilfulness of A., B. is injured while they are jointly engaged in the same service, B. will under ordinary circumstances have no claim against C.; for A. and B., "have both engaged in a common service, the duties of which impose a certain risk on each of them; and, in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant and not of his master. He knew when he engaged in the service that he was exposed to the risk of injury, not only from his own want of skill or care, but also from

(*u*) *Dynen* v. *Leach*, 26 L. J., Ex., 221; *Senior* v. *Ward*, 1 E. & E. 385.

(*x*) *Dynen* v. *Leach*, *supra*; *Priestley* v. *Fowler*, 3 M. & W. 1. See *Winterbottom* v. *Wright*, 10 M. & W. 109; *Mellors* v. *Shaw*, 1 B. & S. 437, 446.

(*y*) *Skipp* v. *Eastern Counties R. C.*, 9 Exch. 223; *Seymour* v. *Maddox*, 16 Q. B. 326.

(*z*) See *Assop* v. *Yates*, 2 H. & N. 768, which likewise illustrates the maxim *In jure non remota causa sed proxima spectatur*.

(*a*) *Hutchinson* v. *York, Newcastle, and Berwick R. C.*, 5 Exch. 343; *Wigmore* v. *Jay*, *Id.* 354; *Tarrant* v. *Webb*, 18 C. B. 797, 804; *Ormond* v. *Holland*, E. B. & E. 102; *Priestley* v. *Fowler*, 3 M. & W. 1, which has often been recognised (see, for instance, *Waller* v. *South Eastern R. C.*, 32 L. J., Ex., 205, 209; S. C., 2 H. & C. 112; *per* Keating, J., *Searle* v. *Lindsay*, 11 C. B. N. S. 439); *Southcote* v. *Stanley*, 1 H. & N. 247, 450.

own servant for bodily hurt sustained through negligence: —"Where," he says, "an injury is occasioned to any one by the negligence of another, if the person injured seeks to charge with its consequences any person other than him who actually caused the damage, it lies on the person injured to show that the circumstances were such as to make some other person responsible. In general, it is sufficient for this purpose to show that the person whose neglect caused the injury was at the time when it was occasioned acting not on his own account but in the course of his employment as a servant in the business of a master, and that the damage resulted from the servant so employed not having conducted his master's business with due care. In such a case the maxim *Respondeat superior* prevails, and the master is responsible."

"But," continues Lord *Cranworth*, "do the same principles apply to the case of a workman injured by the want of care of a fellow-workman engaged together in the same work? I think not. When the workman contracts to do work of any particular sort, he knows, or ought to know, to what risk he is exposing himself; he knows, if such be the nature of the risk, that want of care on the part of a fellow-workman may be injurious or fatal to him, and that against such want of care his employer cannot by possibility protect him. If such want of care should occur, and evil is the result, he cannot say that he does not know whether the master or the servant was to blame. He knows that the blame was wholly that of the servant. He cannot say the master need not have engaged in the work at all, for he was party to its being undertaken.

"Principle, therefore, seems to me opposed to the doctrine, that the responsibility of a master for the ill

which he undertakes, a satisfactory conclusion may be arrived at" (*h*).

The doctrine asserted by the House of Lords in *The Bartonshill Coal Company* v. *Reid*, has been frequently applied, *ex. gr.*, in *Clarke* v. *Holmes* (*i*), in which case *Cockburn*, C. J., observes, that, "where a servant is employed on machinery, from the use of which danger may arise, it is the duty of the master to take due care and to use all reasonable means to guard against and prevent any defects from which increased and unnecessary danger may occur. No doubt when a servant enters on an employment, from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it; or if he thinks proper to accept an employment on machinery defective from its construction, or from the want of proper repair, and with knowledge of the facts enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment." But the danger contemplated on entering into the contract must not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept (*k*). "A master," as remarked on another occasion (*l*), "is by law bound to provide proper and efficient

(*h*) *Waller* v. *South Eastern R. C.*, 32 L. J., Ex., 205, 209; S. C., 2 H. & C. 102; *Abraham* v. *Reynolds*, 5 H. & N. 143; *Vose* v. *Lancashire and Yorkshire R. C.*, 2 H. & N. 728.

(*i*) 7 H. & N. 937, 943–4; S. C., 6 *Id.* 349.

(*k*) *Per* Cockburn, C.J., 7 H. & N. 944; *Weems* v. *Mathieson*, 4 Macq. Sc. App. Cas. 215.

(*l*) *Per* Keating, J., 11 C. B. N. S. 439.

received by the latter whilst in the service of the former has recently been made the subject of legislative enactment. By the Employers' Liability Act (*s*), a master may be sued by his servant for personal injury caused to him by reason of the defective condition of the machinery or plant, or, by the negligence of any person in the service of the employer holding a certain position (defined by the Act) in his employment. An action under this statute must be brought in the County Court, and the amount recoverable is not to exceed such sum as may be found to be equivalent to the estimated earnings during the three years preceding the injury, of a person in a similar position to that occupied by the injured workman. Many of the provisions of the Act have already received judicial construction, and it is not proposed to enter here into the decisions except to notice one case, from which it appears that mere knowledge by the workman of the danger will not of itself preclude him from recovering against his master; it only being a fact to be taken into consideration in determining whether or not the workman has been guilty of contributory negligence (*t*).

Liability of owner of realty for nuisance.

It has been held that the owner of realty is not responsible for a nuisance committed thereon by the occupying tenant, unless, indeed, he has been a party to the creation of the nuisance after the demise, or has demised land with the nuisance existing (*u*).

In *Todd* v. *Flight* (*x*), a lessor had let the premises in a ruinous and dangerous condition, and whilst in that condition and after the lease, a portion of the demised

(*s*) 43 & 44 Vict. c. 42.

(*t*) *Stuart* v. *Evans*, 31 W. R. 706.

(*u*) *Rich* v. *Basterfield*, 4 C. B. 783; cited in *Brown* v. *Bussell*, L. R. 3 Q. B. 261.

(*x*) 9 C. B. (N. S.) 377; 30 L. J. C. P. 21.

on which a private person or a company is liable for damage caused by the neglect of servants has been held applicable to a corporation which has been entrusted by statute to perform certain works, and to receive tolls for the use of such works, although those tolls, unlike the tolls received by the private person or the company, are not applied to the use of the corporation, but are devoted to the maintenance of the works, and in case of any surplus existing to a proportionate diminution of the tolls (*b*).

"The law requires that the execution of public works by a public body shall be conducted with a reasonable degree of care and skill; and if they, or those who are employed by them, are guilty of negligence in the performance of the works entrusted to them, they are responsible to the party injured" (*c*).

In an ordinary case, moreover, where such commissioners in execution of their office enter into a contract for the performance of work, it seems clear that the person who contracts to do the work "is not to be considered as a servant, but a person carrying on an independent business, such as the commissioners were fully justified in employing to perform works which they could not execute for themselves, and who was known to all the world as performing them" (*d*). And the

(*b*) *Mersey Docks Trustees* v. *Gibbs*, *Same* v. *Penhallow*, L. R. 1 H. L. 93, where the cases are reviewed.

(*c*). *Clothier* v. *Webster*, 12 C. B. N. S. 790, 796. See *Brownlow* v. *Metropolitan Board of Works*, 16 C. B. N. S. 546; *Gibson* v. *Mayor, &c., of Preston*, L. R. 5 Q. B. 218; *Parsons* v. *St. Mathew, Bethnal Green*, L. R. 3 C. P. 56; *Hyams* v. *Webster*, L. R. 4 Q. B. 138. Local Boards and other bodies constituted surveyors of highways are an exception to this rule, and an action will not lie at the suit of one of the public, injured by the defective condition of the highway. *Gibson* v. *The Corporation of Preston*, L. R. 5 Q. B. 218, 39 L. J. Q. B. 131.

(*d*) Judgm., *Allen* v. *Hayward*, 7

se—which is applied to render the master answerable for the negligence of his servant, because this has arisen from his own negligence or imprudence in selecting or retaining a careless servant—is not applicable to the sovereign, in whom negligence or misconduct cannot be implied, and for which, if it occurs in fact, the law affords no remedy. Accordingly, in a modern case, already alluded to, it was observed by Lord *Lyndhurst*, that instances have occurred of damage occasioned by the negligent management of ships of war, in which it has been held, that, where an act is done by one of the crew without the participation of the commander, the latter is not responsible; but that if the principle contended for in the case then before the Court were correct, the negligence of a seaman in the service of the Crown would, in such a case, render the Crown liable to make good the damage; a proposition which certainly could not be maintained (*k*).

(*k*) *Viscount Canterbury* v. *A.-G.*, 1 Phill. 306; *Feather* v. *Reg.*, 6 B. & S. 294, *et seq.*; *Tobin* v. *Reg.*, 16 C. B. N. S. 310; *Reg.* v. *Prince*, L. R. 1 C. C. 150. See *Hodgkinson* v. *Fernie*, 2 C. B. N. S. 415.

It seems almost superfluous to observe, that the above remarks upon the maxim *Respondeat superior*, are to some considerable extent applicable in criminal law. On the one hand, a party employing an innocent agent is liable for an offence committed through this medium; on the other, if the agent had a guilty knowledge he will be responsible as well as his employer. See Bac. Max., reg. 16. Though "it is a rule of criminal law that a person cannot be criminally liable for acting as the agent of another without any knowledge that he was acting wrongly;" *per* Crompton, J., *Hearne* v. *Garton*, 2 E. & E. 76.

In *Coleman* v. *Riches*, 16 C. B., 118, Jervis, C.J., specifies various cases in which criminal responsibility will be entailed on a master for the acts of his servants in the ordinary course of their employment.

"There are," moreover, "many acts of a servant for which, though criminal, the master is civilly responsible by action:" *per* Jervis, C.J., *Dunkley* v. *Farris*, 11 C. B., 458; *Palmer* v. *Evans*, 2 C. B. N. S. 151; *Roberts*, app., *Preston*, resp., 9 C. B. N. S. 208.

Upon the above subject Lord Wensleydale thus observes:—"I take it to be a clear proposition of law, that if a man employs an agent for a per-

OMNIS RATIHABITIO RETROTRAHITUR ET MANDATO PRIORI ÆQUIPARATUR. (*Co. Litt.* 207, *a.*)—*A subsequent ratification has a retrospective effect, and is equivalent to a prior command.*

General rule.

It is a rule of very wide application, and one which we find repeatedly laid down in the Roman law, that *ratihabitio mandato comparatur* (*n*), where *ratihabitio* is defined to be "the act of assenting to what has been done by another in my name" (*o*). "No maxim," remarks Mr. Justice *Story*, "is better settled in reason and law than the maxim, *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur* (*p*), at all events, where it does not prejudice the rights of strangers. And the civil law does not, it is believed, differ from the common law on this subject" (*q*).

It is, then, true as a general rule, of which instances have occurred in the preceding pages, and with respect to which we shall merely make a few additional observations in this place (*r*), that a subsequent ratification and adop-

(*n*) D. 46. 3. 12, § 4; D. 50. 17. 60; D. 3. 5. 6, § 9; D. 43. 16. 1, § 14.

(*o*) Brisson. ad verb. "*Ratihabitio.*"

(*p*) Co. Litt. 207. a; 258. a; Wing. Max. 485. Many instances of the application of this maxim are given in 18 Vin. Abr., p. 156, tit. "*Ratihabitio.*" See *Ward* v. *Broomhead*, 7 Exch. 726; *Sievewright* v. *Archibald*, 17 Q. B. 103; cited *per* Erle, C.J., *Heyworth* v. *Knight*, 17 C. B. N. S. 308. (See, also, *Parton* v. *Crofts*, 16 C. B. N. S. 11.) *Doe* d. *Gutteridge* v. *Sowerby*, 7 C. B. N. S. 599, 626.

(*q*) *Per* Story, J., delivering judgment, *Fleckner* v. *United States Bank*, 8 Wheaton (U. S.), R. 363.

(*r*) The operation of the maxim as to *ratihabitio* with reference to the law of principal and agent, is considered at length in Story on Agency.

See *Mitcheson* v. *Nicol*, 7 Exch. 929; *Simpson* v. *Eggington*, 10 Exch. 845 (which forcibly illustrates the maxim, *supra*, and in connection with which, see *per* Maule, J., *Tassell* v. *Cooper*, 9 C. B. 532; *Kemp* v. *Balls*,

bitio well applied to such a case; and it was held, that the jury were warranted in inferring a joint authority to insure, and that the part-owners were jointly liable for the premium to the insurance-broker, although he had debited H. alone, and divided with him the profits of commission, upon effecting the insurance (*x*). It is, indeed, true that "no one can sue upon a contract, unless it has been made by him, or has been made by an agent professing to act for him, and whose act has been ratified by him;" and although persons who could not be named or ascertained at the time when a policy of insurance was effected, are allowed to come in and take the benefit of the insurance, yet they must be persons who were contemplated when the policy was made (*y*).

Again—"if an arbitrator omits to enlarge the time limited for making his award, but continues to act as if he had enlarged it, even to making his award, although in fact he has no authority, yet he is a person *animo agendi*, and if the parties afterwards choose to ratify his act by agreeing that the time shall be enlarged or otherwise, though the act was not enforceable, yet, if ratified, it would be just as binding as if done with original authority" (*z*).

Without unnecessarily multiplying instances to the same effect as the preceding, it may be sufficient to state the general proposition, that the subsequent assent by the principal to his agent's conduct not only exonerates the latter from the consequences of a departure from his orders, but likewise renders the principal liable on contracts made in violation of such orders, or even where

(*x*) *Robinson* v. *Gleadow*, 2 Bing., N. C., 156, 161. See *Prince* v. *Clark*, 1 B. & C. 186.

(*y*) *Watson* v. *Swann*, 11 C. B. N. S. 756, 769.

(*z*) *Per* Blackburn, J., *Lord* v. *Lee*, L. R. 3 Q. B. 404, 408.

time of the supposed ratification the means of forming an independent judgment (*e*).

Reason of the rule as to ratification when applied to contracts.

The doctrine *Omnis ratihabitio retrotrahitur, et mandato æquiparatur* is one," remark the Court of Exchequer in a modern case (*f*), "intelligible in principle, and easy in its application, when applied to cases of contract. If A., unauthorised by me, makes a contract on my behalf with B., which I afterwards recognise and adopt, there is no difficulty in dealing with it, as having been originally made by my authority. B. entered into the contract on the understanding that he was dealing with me, and when I afterwards agreed to admit that such was the case, B. is precisely in the condition in which he meant to be; or if he did not believe A. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. as principal at his option, and has the same equities against me, if I sue, which he would have had against A." It should also be stated that there cannot be an effective ratification of a contract by a person or company not in existence at the time such contract was effected, consequently a company cannot ratify a contract which purported to be made on its behalf before it existed as a company (*g*).

Further, an act void and illegal in its inception, for want of authority given by a third person, cannot be made good by the subsequent ratification of the latter. Thus, where one Jones forged the defendant's name to a promissory note, and the defendant subsequently, by a

(*e*) *Savery* v. *King*, 5 H. L. Cas. 627, 664.

(*f*) *Bird* v. *Brown*, 4 Exch. 798, 799; *per* Lord Wensleydale, *Ridgway* v. *Wharton*, 6 H. L. Cas. 296.

(*g*) *Re Empress Engineering Co.*, 16 Ch. Div. 125; *Melhado* v. *Porto Alegre Railway Co.*, L. R. 9 C. P. 503; 43 L. J. C. P. 253; *Kelner* v. *Baxter*, L. R. 2 C. P. 174; *Spiller* v. *Paris Skating Rink Co.*, 7 Ch. Div. 368, is overruled by the later authorities.

written memorandum, undertook to be responsible for the note "bearing his signature," it was held that, even assuming the memorandum purported to ratify the act of Jones in signing the defendant's name, it could not operate so, because, although a voidable act may be ratified by matter subsequent, it is otherwise where an act is originally and in its inception void (*h*). The Court also held, that as Jones did not purport to sign on behalf of the defendant, but held out the signature as the defendant's, the doctrine of ratification did not apply.

Rule, how it applies i actions *ex delicto*.

In cases of tort, there is more difficulty (*i*). If A. professing to act by my authority, does that which *primâ facie* amounts to a trespass, and I afterwards assent to and adopt his act, there he is treated as having from the beginning acted by my authority, and I become a trespasser unless I can justify the act, which is to be deemed as having been done by my previous sanction. So far there is no difficulty in applying the doctrine of ratification even in cases of tort. The party ratifying becomes, as it were, a trespasser by estoppel; he cannot complain that he is deemed to have authorised that which he admits himself to have authorised.

But the authorities go much further, and show that in some cases, where an act, which if unauthorised would amount to a trespass, has been done in the name and on behalf of another, but without previous authority, the subsequent ratification may enable the party, on whose behalf the act was done, to take advantage of it, and to treat it as having been done by his direction. But this doctrine must be taken with the qualification that the act of ratification must take place at a time, and under

(*h*) *Brook* v. *Hook*, L. R. 6 Ex. 89; 40 L. J. Ex. 50.

(*i*) *Bird* v. *Brown*, 4 Ex. 798, 799.

circumstances when the ratifying party might himself have lawfully done the act which he ratifies (*k*).

In accordance with the foregoing remarks it has been held, that a railway company may be liable for an assault ratified by them, if the act complained of could be said to have been done for the use or benefit of the company, *ex. gr.*, the assault and imprisonment of a party liable to the company for not having paid his fare, is an act of a servant of the company which manifestly might have been for their benefit; it might therefore be ratified by them (*l*).

By the common law, says Sir *E. Coke* (*m*), "he that receiveth a trespass, and agreeth to a trespass after it be done, is no trespasser, *unless the trespass was done to his use, or for his benefit*, and then his agreement subsequent amounteth to a commandment; for, in that case, *Omnis ratihabitio retrotrahitur et mandato æquiparatur*." The question of liability by ratification depends accordingly upon this consideration—whether the act was originally intended to be done to the use or for the benefit of the party who is afterwards said to have ratified it (*n*). A person, therefore, who knowingly receives from another a chattel which the latter has wrongfully seized, and afterwards on demand refuses to give it back to the owner, does not thereby become a joint

(*k*) *Acc. per* Bovill, C.J., *Ainsworth* v. *Creeke*, L. R. 4 C. P. 486; cited in *Medwin* v. *Streeter*, *Id.* 496.

(*l*) Judgm., *Eastern Counties R. C.* v. *Broom*, 6 Exch. 326, 327; *Roe* v. *Birkenhead, Lancashire, and Cheshire R. C.*, 7 Exch. 36.

(*m*) 4 Inst. 317; cited, *per* Parke, J., 4 B. & Ad. 616; *per* Willes, J., *Stacey*, app., *Whitehurst*, resp., 18 C. B. N. S. 356; Arg., *Nicoll* v. *Glennie*, 1 M. & S. 590; 6 Scott, N. R. 897. See another application of the maxim to a tort, *per* Lord Ellenborough, C. J., 9 East, 281.

(*n*) Judgm., 6 Exch. 327; *James* v. *Isaacs*, 12 C. B. 791.

inquiry, to take the risk upon himself, and to adopt the whole of their acts (*r*).

Generally speaking, the subsequent ratification of an act done *as agent*, is equal to a prior authority. This proposition, however, is *not* universally true. In the case of a tenant from year to year, who has by law a right to a half-year's notice to quit, if such notice be given by an agent without the authority of the landlord, the tenant is not bound by it (*s*). Where, moreover, a person commits a tortious act,—as, if he seize goods, claiming property in them himself,—the subsequent agreement of another party will not amount to a ratification of his authority at the time (*t*). So, if two out of three executors contract with another person on their own account, *and as agents* for the third executor, such last-mentioned party may adopt the contract, and all three may sue upon it, although it was made with the two only: but if the contract was with the two *on their own account only*, they could not; for, to such a case according to the distinction above mentioned, the maxim which we have been illustrating does not apply (*u*).

Whether a criminal act can be so ratified by another as to make the ratifier a *particeps criminis*, is a matter of considerable doubt, and seems never to have been distinctly decided. In *Reg.* v. *Woodward* (*x*), the defendant's wife had received the stolen goods from the principal felon, and paid him part of the price on account; the

(*r*) *Lewis* v. *Read*, 13 M. & W. 834; *Freeman* v. *Rosher*, 13 Q. B. 780, 789; *per* Blackburn, J., *Lord* v. *Lee*, L. R. 3 Q. B. 408; *Haseler* v. *Lemoyne*, 5 C. B. N. S. 530; *Collett* v. *Foster*, 2 H. & N. 356, 361.

(*s*) Judgm., 2 Exch. 188.

(*t*) Judgm., 6 Scott, N. R. 904.

(*u*) *Heath* v. *Chilton*, 12 M. & W. 632, 638.

(*x*) *Reg.* v. *Woodward*, 31 L. J. M. C. 91, cited Smith's L. C., 8th ed., 382.

latterly considered, *viz.*, *Qui facit per alium facit per se*—*Respondeat superior*—and *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*—will often simultaneously claim attention from the practitioner, where a state of facts involving the relation of principal and agent is placed before him. It may well therefore be imagined, that the effort would be vain to separate from each other and systematically classify reported cases, illustrating the maxims specified. Little has consequently been here attempted in dealing with these elementary principles beyond offering to the reader a selection of decisions, arranged under the respective heads to which they seemed specially appropriate, fitted for impressing on his mind the meaning and leading qualifications of the legal principles above commented on.

NIHIL TAM CONVENIENS EST NATURALI ÆQUITATI QUAM UNUMQUODQUE DISSOLVI EO LIGAMINE QUO LIGATUM EST. (2 *Inst.* 360.)—*Nothing is so consonant to natural equity as that every contract should be dissolved by the same means which rendered it binding.*

Rule, and reason of the rule.

Every contract or agreement ought to be dissolved by matter of as high a nature as that which first made it obligatory (*z*). And, again, "it would be inconvenient that matters in writing, made by advice and consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment

(*z*) Jenk. Cent. 166; *Id.* 74.

Record.

We propose, in the next place, to consider the three following species of obligations: *viz.*, by record, by specialty, and by simple contract; as to the first of which it will suffice to say, that an obligation by record may clearly be discharged by a release under seal (*f*); and that a judgment or decree of the House of Lords can, due regard being had to constitutional principles, only be reversed or corrected by Act of Parliament (*g*).

Specialty how discharged before breach.

In the case of a specialty, no rule of our common law was better established than that such a contract could, before breach, only be discharged by an instrument of equal force (*h*); that a subsequent parol, that is to say, written or verbal agreement, not under seal, dispensing with or varying the time or mode of performance of an act covenanted to be done, could not be pleaded in bar to an action, on an instrument under seal, for non-performance of the act in the manner thereby prescribed (*i*),—in

markable instance of the revival of an obsolete law. See, also, *per* Patteson, J., *Reg.* v. *Archbishop of Canterbury*, 11 Q. B. 627.

(*f*) *Per* Parke, B., *Barker* v. *St. Quintin*, 12 M. & W. 453 (cited in *Ex parte Games*, 3 H. & C. 299); Litt., s. 507, and the commentary thereon; Shep. Touch., by Preston, 322; *Farmer* v. *Mottram*, 7 Scott, N. R. 408.

(*g*) *Tommey* v. *White* 3 H. L. Cas. 49; *per* Lord Campbell, C. J., 1 E. & B. 804. See *Frith* v. *Wollaston*, 7 Exch. 194. A local custom may, of course be abrogated by statute, see (*ex. gr.*) *Truscott* v. *Merchant Tailors' Co.*, 11 Exch. 855; *Cooper* v. *Hubbuck*, 12 C. B. N. S. 456.

(*h*) *Per* Bosanquet, J., 3 Scott, N. R. 216. But in certain cases an equitable plea may be available that performance has been dispensed with by an instrument not under seal; see *per* Pollock, C. B., 1 H. & N. 458.

(*i*) *Heard* v. *Wadham*, 1 East, 619; *Gwynne* v. *Davy*, 2 Scott, N. R. 29; cited *per* Cockburn, C. J., L. R. 3 Q. B. 127; *Roe* v. *Harrison*, 2 T. R. 425; *Blake's case*, 6 Rep. 43; *Peytoe's case*, 9 Rep. 77; *Kaye* v. *Waghorn*, 1 Taunt. 428; Jenk. Cent. 66; *Cocks* v. *Nash*, 9 Bing. 341; *Harden* v. *Clifton*, 1 Q. B. 522; *Rippinghall* v. *Lloyd*, 5 B. & Ad. 742, is particularly worthy of perusal in connection with the above subject.

short, that the terms of a deed could not be contradicted or varied by parol; that a parol licence could not be set up in opposition to a deed (*k*).

In equity the rule appears to have been different (*l*); a parol agreement founded on valuable consideration would have been a good ground for an injunction to restrain an action upon the original deed, in breach of the subsequent agreement; and it would appear from the authorities that a contract under seal before breach, even if required by law to be in writing, may be rescinded by a valid parol agreement (*m*).

Accord and satisfaction after breach.

Where there has been a breach of a contract under seal, and the damages are unliquidated, accord with satisfaction of the damages resulting from such breach may be a good plea to an action on the specialty; the action being founded, not merely on the deed, but on the deed and the subsequent wrong, which wrong is the cause of action and for which damages are recoverable (*n*). At law nothing, however, could discharge a covenant to pay on a certain day, but actual payment or tender on that day (*o*). Accord and satisfaction was no bar to an action for a debt certain covenanted to be paid (*p*), the reason apparently being that the duty to pay took its essence and operation originally and solely by the writing, and therefore it ought to be avoided by matter of as high a nature (*q*). In equity, however, accord and satisfaction would be a

(*k*) *Per* Lush, J., *Albert* v. *Grosvenor Investment Co.*, L. R. 3 Q. B. 128.

(*l*) See Addison on Contracts, 8th ed., 1221; Leake, Digest of Contracts, 802; *Taylor* v. *Manners*, L. R. 1 Ch. App. 48; 38 L. J. Ch. 128.

(*m*) See note (*l*), *supra*, and Fry, Specific Performance, 2nd ed., 445.

(*n*) *Blake's case*, 6 Rep. 43.

(*o*) *Per* Parke, B., *Poole* v. *Tumbridge*, 2 M. & W. 223, 226.

(*p*) Judgm., *Massey* v. *Johnson*, 1 Exch. 253.

(*q*) Leake, p. 877.

good answer to the action, it being always borne in mind that payment and acceptance of a smaller sum in satisfaction of a larger is no answer to an action for the balance (*r*).

It has been held in equity that a voluntary declaration by a creditor that he intends to release his debtor from a debt, though not amounting to a release at law, may nevertheless, if *acted upon* by the debtor, be held in equity to be a representation which the creditor is bound by (*s*).

The preceding remarks may, therefore, be summed up thus, that a party liable on a specialty may be relieved, before breach, first by an agreement founded on valuable consideration, which agreement may be by word of mouth; and, secondly, it is submitted by the voluntary declaration of the obligee if acted upon by the obligor to the knowledge of the former.

Simple contracts.

The extent of applicability of the maxim, *Unumquodque dissolvitur eodem ligamine quo ligatur*, to simple contracts, may be thus concisely indicated: "It is," says *Parke*, B., in *Foster* v. *Dawber* (*t*), "competent for both parties to an *executory* contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract (*u*). But an *executed* contract cannot be discharged, except by release under seal, or by performance of the obligation," or by accord and satisfaction (*x*).

(*r*) *Infra*, p. 843.

(*s*) *Yeomans* v. *Williams*, L. R. 1 Eq. 184.

(*t*) 6 Exch. 839, 851.

(*u*) See *De Bernardy* v. *Harding*, 8 Exch. 822.

(*x*) *Goldham* v. *Edwards*, 17 C. B. 141, and note (*r*), p. 842. "It is a general rule of law, that a simple contract may *before* breach be waived or discharged, without a deed and without consideration; but *after* breach there can be no discharge, except by deed or upon sufficient consideration." Byles on Bills, 7th ed., p. 168, adopted *per*

the written contract (*b*); but, after the instrument has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract, not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make it a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement (*c*). It should be observed, that the first part of the above rule is confined and must be restricted in its application to a contemporaneous *verbal* agreement. It has been expressly decided, that, in an action on a bill or note, a contemporaneous agreement, *in writing*, may be set up to vary the contract evidenced by such instru-

(*b*) See *Eden* v. *Blake*, 13 M. & W. 614 (which presents a good illustration of this rule); *Abrey* v. *Crux*, L. R. 5 C. P. 37; *Laurie* v. *Scholefield*, L. R. 4 C. P. 622; *per* Willes, J., *Hefficld* v. *Meadows*, L. R. 4 C. P. 599; *Lockett* v. *Nicklin*, 2 Exch. 93; *Shelton* v. *Livius*, 2 Cr. & J. 411; *Martin* v. *Pycroft*, 2 De G. M. & G. 785; *Adams* v. *Wordley*, 1 M. & W. 374, 380; recognised in *Flight* v. *Gray*, 3 C. B. N. S. 320; 322; *Hughes* v. *Statham*, 4 B. & C. 187; *Hoare* v. *Graham*, 3 Camp. 57; cited *per* Tindal, C.J., 5 Scott, N. R. 254; *Henson* v. *Coope*, 3 Scott, N. R. 48; *Reay* v. *Richardson*, 2 Cr. M. & R. 422; *per* Bayley, J., *Lewis* v. *Jones*, 4 B. & C. 512; *per* Lord Abinger, C.B., *Allen* v. *Pink*, 4 M. & W. 140, 144; *Knapp* v. *Harden*, 1 Gale, 47; *Soares* v. *Glyn*, 8 Q. B. 24; *Manley* v. *Boycot*, 2 E. & B. 46.

See *Malpas* v. *London and South Western R. C.*, L. R. 1 C. P. 336.

A mistake in the original written contract may sometimes be set up by way of equitable defence: see *Steele* v. *Haddock*, 10 Exch. 643; *Reis* v. *Scottish Equitable Life Ass. Soc.*, 2 H. & N. 19; *Wake* v. *Harrop*, 6 H. & N. 768.

But formerly an equitable defence to an action was admissible only where it set up matter in respect of which a court of equity would have granted relief unconditionally; *Flight* v. *Gray*, *supra*.

(*c*) Judgm., *Goss* v. *Lord Nugent*, 5 B. & Ad. 64, 65; *Hargreaves* v. *Parsons*, 13 M. & W. 561. *Taylor* v. *Hilary*, 1 Cr. M. & R. 741, and *Giles* v. *Spencer*, 3 C. B. N. S. 244, present instances of substituted agreements. See, also, *Patmore* v. *Colburn*, *Id.* 65; *Douglas* v. *Watson*, 17 C. B. 685.

if issue be taken thereon, the defendant, it has been observed, must prove "a proposition to exonerate on the part of the plaintiff, acceded to by himself, and this in effect will be a *rescinding* of the contract previously made" (*i*).

Where writing is required by statute.

Where a contract is required to be in writing by the statute law, it clearly cannot be *varied* by any subsequent *verbal* agreement between the parties; for, if this were permitted, the intention of the legislature would be altogether defeated (*k*). A contract, for instance, falling within the operation of the 4th section of the Statute of Frauds cannot be waived and abandoned *in part;* for the object of the statute (*l*) was to exclude all oral evidence as to contracts for the sale of land; and, therefore, any contract sought to be enforced must be proved by writing only; and if such a contract could be verbally waived in part, the new contract between the parties would have to be proved partly by the former written agreement, and partly by the new verbal agreement (*m*). And this reasoning applies also to a contract

(*i*) Judgm., 7 M. & W. 59. In *Wood* v. *Leadbitter*, 13 M. & W. 838, it was held that a parol licence to enter and remain for some time on the land of another, even though money were paid for it, is revocable at any time, and without paying back the money. In this case the law respecting the revocation of a licence was much considered. See, also, *Roffey* v. *Henderson*, 17 Q. B. 586; *Adams* v. *Andrews*, 15 Q. B. 284; *Taplin* v. *Florence*, 10 C. B. 744.

As to the proper mode of pleading a contemporaneous or subsequent agreement, varying that entered into between the parties, see *per* Parke, B., *Heath* v. *Durant*, 12 M. & W. 440, which was an action of assumpsit on a policy of insurance.

(*k*) With reference to the Statute of Frauds, see *Goss* v. *Lord Nugent*, 5 B. & Ad. 58; *Caton* v. *Caton*, L. R. 2 H. L. 127; *per* Maule, J., *Pontifex* v. *Wilkinson*, 2 C. B. 361; *per* Alderson, B., *Eden* v. *Blake*, 13 M. & W. 616; *Stowell* v. *Robinson*, 3 Bing. N. C. 928, 938.

(*l*) See *Wain* v. *Warlters*, 5 East, 10; *Morley* v. *Boothby*, 3 Bing. 112.

(*m*) Judgm., *Goss* v. *Lord Nugent*, 5 B. & Ad. 66; recognised, *Marshall*

question, therefore, is, whether we can supply an alleged defect in the contract by parol evidence of a contemporaneous or subsequent agreement for the payment of the salary quarterly. I think that would be a direct violation of the statute" (*q*).

It seems that neither the 4th nor the 17th section of the Statute of Frauds can apply to prevent a verbal *waiver* or *abandonment* of a contract within its operation from being set up as a good defence to an action upon the contract. Under the former of these sections, indeed, the remedy by action is taken away in certain specified cases if there be no written agreement, and, under the latter the particular contract is invalidated; but it does not appear that a verbal rescission of the contract would be void as within the language of either section, nor that the policy of the statute would lead to such a conclusion (*r*); and a parol agreement amounting to an entire abandonment and rescission of the contract, would be effectual in equity in answer to a claim by either party to specific performance (*s*). A verbal alteration of a contract required by statute to be in writing, being invalid,

(*q*) *Giraud* v. *Richmond*, 2 C. B. 834, 840; recognising *Goss* v. *Lord Nugent*, *supra*.

(*r*) See Judgm., *Goss* v. *Lord Nugent*, 5 B. & Ad. 65, 66; cited *Harvey* v. *Grabham*, 5 A. & E. 74; *Stead* v. *Dawber*, 10 A. & E. 65; Judgm., *Noble* v. *Ward*, L. R. 2 Ex. 137-8. See *Moore* v. *Campbell*, *supra*. To an action for breach of a parol contract, accord and satisfaction is a good plea, Cur., *Taylor* v. *Hilary*, 1 C. M. & R. 743; *Griffiths* v. *Owen*, 13 M. & W. 58; *Carter* v. *Wormald*, 1 Exch. 81; *Bainbridge* v. *Lax*, 16 L. J., Q. B. 85. As to what will constitute or support a plea of accord and satisfaction, see *Hall* v. *Flockton*, 16 Q. B. 1039; S. C., 14 *Id.* 380; *Williams* v. *London Commercial Exchange Co.*, 10 Exch. 569; *Gabriel* v. *Dresser*, 15 C. B. 622; *Perry* v. *Attwood*, 6 E. & B. 691, and cases there cited.

(*s*) Fry, Specific Perform., 2nd ed., 445; Leake, Digest of Contracts, 799, and cases there, note (*f*).

does not effect an implied rescission of the origina
tract (*t*).

We may further observe, in connection with the r
under consideration, that payment of a portion
liquidated and ascertained demand, cannot be in
satisfaction of the whole; for here the contract be
the parties consists in reality of two parts, *viz.*, pay
and an agreement to give up the residue; which
agreement is void, as being made without consideratio
The above rule does not, however, apply if the cla
bonâ fide disputable; nor if there has been an accep
of a chattel or of a negotiable security in satisfa
of the debt, will the Court examine whether that
faction were a reasonable one, but it will merely in
whether the parties actually came to such an agreer
A man, therefore, may give in satisfaction of a del
£100 a horse of the value of £5, but not £5; and a
of money payable at a *different time* may be a
satisfaction of a larger sum payable at a future day
Moreover, although the obligor of a bond cannot, at
day appointed, pay a less sum in satisfaction of the wl
yet if the obligee then receive a part and give his acc
tance under seal for the whole, this will be a good
charge, according to the maxim, *Eodem ligamine
ligatum est dissolvitur* (*y*).

(*t*) *Noble* v. *Ward*, L. R. 2 Ex. 135. See *Ogle* v. *Earl Vane*, L. R. 3 Q. B. 272.

(*u*) *Beere* v. *Fookes*, 11 Q. B. D. 221; 52 L. J., Q. B. 712; *Sibree* v. *Tripp*, 15 M. & W. 23; qualifying the decision in *Cumber* v. *Wane*, 1 Stra. 426.

See *per* Parke, B., *Curlewis* v. *Clark*, 3 Exch. 377, and in *Evans* v. *P*
1 Exch. 606; *Pinnel's case*, 5
117; *Jones* v. *Sawkins*, 5 C. B.
Grimsley v. *Parker*, 3 Exch.
Hall v. *Conder*, 2 C. B. N. S. 2

(*x*) 15 M. & W. 34, 38; *Coop*
Parker, 14 C. B. 118.

(*y*) Co. Litt. 212, b.; *per* Pa
B., 15 M. & W. 34.

Additional example of maxim.

Lastly, the maxim which has been here considered has been held to apply in some cases which do not fall within the law of contracts: thus, a donative is a benefice merely given and collated by the patron to a man, without either presentation to, or institution by, the ordinary, or induction by his order. In this case, the resignation of the donative by the incumbent must be made to the patron; for a donative begins only by the erection and foundation of the donor, and he has the sole visitation and correction, the ordinary having nothing to do therewith; and, as the incumbent comes in by the patron, so he may restore to him that which he conferred, for *Unumquodque eodem modo quo colligatum est dissolvitur* (*z*).

VIGILANTIBUS, NON DORMIENTIBUS, JURA SUBVENIUNT (2 Inst. 690.)—*The laws assist those who are vigilant, not those who sleep over their rights* (*a*).

Instances of this rule.

We have already, under the maxim *Caveat emptor* (*b*), considered cases illustrative of the proposition that courts of justice require and expect that each party to a contract or bargain shall exercise a due degree of vigilance and caution; we shall now, therefore, confine our attention to the important subject of the limitation of actions, which will serve to exemplify that general policy of our law, in pursuance of which "the using of legal diligence is always

(*z*) *Per* Littledale, J., *Rennell* v. *Bishop of Lincoln*, 7 B. & C. 160; S. C., 8 Bing. 490; citing *Fairchild* v. *Gaire*, Yelv. 60; S. C., Cro. Jac. 65; 3 Burn, Eccles. Law, 9th ed., 541.

(*a*) See Wing. Max., p. 672; Hobart, R. 347.

(*b*) See, also, the maxim, *Prior tempore, potior jure.*

matter of regret in modern times that, in the construction of the Statute of Limitations (21 Jac. 1, c. 16), the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that instead of being viewed in an unfavourable light as an unjust and discreditable defence, it had not received such support as would have made it what it was intended to be, emphatically a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of witnesses" (*i*). So in the ancient possessory actions, "there was a time of limitation settled, beyond which no man should avail himself of the possession of himself or his ancestors, or take advantage of the wrongful possession of his adversary; for if he were negligent for a long and unreasonable time, the law refused afterwards to lend him any assistance to recover the possession merely; both to punish his neglect, *nam leges vigilantibus, non dormientibus, subveniunt,* and also because it was presumed that the supposed wrong-doer had in such a length of time procured a legal title, otherwise he would sooner have been sued" (*k*). . . . And further, Sir W. P. *Wood,* V.C., remarks, in *Manby* v. *Bewicke* (*l*), that, "the legislature has in this, as in every civilized country that has

(*i*) *Bell* v. *Morrison,* 1 Peters (U.S.), R. 360.

(*k*) 3 Com. by Broom & Hadley, 270, 271. As to the doctrine of Prescription in the Roman Law, see Mackeld. Civ. Law, 290. *Usucapio constituta est ut aliquis litium finis esset*; D. 41. 10. 5; Wood, Civ. Law, 3rd ed., 123.

(*l*) 3 K. & J. 352; *Trustees of Dundee Harbour* v. *Dougall,* 1 Macq. Sc. App. Cas. 317.

force, that shall be sued or brought at any time after the end of the then session of Parliament, shall be commenced and sued within the time and limitation following,—(that is to say),—the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or *other specialty* (*o*), or actions of debt or *sci. fa.* upon recognizance, within ten years after the end of the then session of Parliament, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year (*p*) after the end of the then session, or within two years after the cause of such actions or suits, but not after; and the said other actions, within three years after the end of the then session, or within six years after the cause of such actions or suits, but not after (*q*). It is, however, further provided, that nothing in this Act shall extend to any action given by any statute, where the time for bringing such action is or shall be by any statute specially limited.

By section 4 of the same statute, it is further enacted, that, if any person, entitled to any such action or suit as above mentioned, shall, at the time of such cause of action accruing, be within the age of twenty-one years, *feme covert, non compos mentis*, [or beyond the seas (*r*),]

(*o*) An action of debt by a railway Company for calls under the 8 & 9 Vict. c. 16, and the Company's Special Act, must be brought within *twenty* years of the accruing of the cause of action; *Cork and Bandon R. C.* v. *Goode*, 13 C. B. 826; S. C., *Id.* 618. See *Shepherd* v. *Hills*, 11 Exch. 55, 65, 67 (where the action was likewise held to be founded on a statute); *Tobacco Pipe Makers* v. *Loder*, 16 Q. B. 765; *Jones* v. *Pope*, 1 Wms. Saund. 38.

(*p*) See stat. 31 Eliz. c. 5, s. 5; *Dyer* v. *Best*, 4 H. & C. 189.

(*q*) See *Sturgiss* v. *Darell*, 4 H. & N. 622.

(*r*) See 19 & 20 Vict. c. 97, s. 10.

then such person shall be at liberty to bring the same, provided it be commenced within the specified time after coming to or being of full age, discovert, of sound memory, [or returned from beyond the seas (*s*)]; and a provision is inserted in the same section, which applies to the case of a defendant similarly circumstanced (*t*).

Simple contracts.

The doctrine of limitation in the case of simple contracts is founded upon a presumption of payment or release arising from length of time, as it is not common for a creditor to wait so long without enforcing payment of what is due; and, as presumptions are founded upon the ordinary course of things, *ex eo quod plerumque fit*, the laws have formed the presumption, that the debt, if not recovered within the time prescribed, has been acquitted or released. Besides, a debtor ought not to be obliged to take care for ever of the acquittances which prove a demand to be satisfied; and it is proper to limit a time beyond which he shall not be under the necessity of producing them. This doctrine has also been established as a punishment for the negligence of the creditor. The law having allowed him a time within which to institute his action, the claim ought not to be received or enforced when he has suffered that time to elapse (*u*).

For the above reasons, it was enacted by stat. 21 Jac. 1, c. 16, s. 3 (*x*), that all actions of account and of

(*s*) *Id.*

(*t*) See *Forbes* v. *Smith*, 11 Exch. 161.

(*u*) 1 Pothier, by Evans, 451.

(*x*) This statute, observes Pollock, C. B., in *Gulliver* v. *Gulliver*, 1 H. & N. 176, "applies in terms to actions at law only, though by analogy courts of equity have adopted the provision; but the 85th section of the Com. Law Proc. Act, 1854, cannot alter the effect of the Statute of Limitations in Courts of Law."

See *Harris* v. *Quine*, L. R. 4 Q. B. 653.

assumpsit (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants), and all actions of debt grounded upon any lending or contract without specialty, and all actions of debt or arrearages of rent (*y*), shall be commenced and sued within six years next after the cause of such action or suit, and not after (*z*). And now by stat. 19 & 20 Vict. c. 97, s. 9, it is further provided that

"Merchants' accounts."

"All actions of account or for not accounting, and suits for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or, when such cause has already arisen, then within six years after the passing of this Act; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit."

The 7th section of the statute of James, above cited, contains also a proviso, similar to those already mentioned, with respect to infants, married women, *non*

(*y*) See 3 & 4 Will. 4, c. 27, s. 42; 19 & 20 Vict. c. 97, ss. 10, 11.

(*z*) See *Hartland* v. *Jukes*, 1 H. & C. 667. No time less than six years is unreasonable, as between drawer and holder of a cheque, for its presentment, unless loss is occasioned by the delay; *Laws* v. *Rand*, 3 C. B. N. S. 442. See also, as to payment by cheque, *Hopkins* v. *Ware*, L. R. 4 Ex. 268.

Inasmuch as a debt which accrued more than six years before action brought may have been renewed within that period, a plea of the Statute of Limitations ought to allege that the debt did not accrue within the six years. See *Bush* v. *Martin*, 2 H. & C. 311; *et vide Everett* v. *Robertson*, 1 E. & E. 16.

compotes mentis [and persons imprisoned or beyond the seas (*a*)], *viz.*, that an action may be commenced in the above cases within six years after the particular disability shall have ceased. The action of debt for not setting out tithes is not within the above statute; but, by 53 Geo. 3, c. 127, s. 5, no action shall be brought for the recovery of any penalty for not setting out tithes, unless such action be brought within six years from the time when such tithes became due.

Absence beyond seas or imprisonment of a creditor is no longer a disability.

With respect to certain of the statutory disabilities above specified, it has been recently enacted that "no person or persons who shall be entitled to any action or suit, with respect to which the period of limitation within which the same shall be brought is fixed," by the 21 Jac. 1, c. 16, s. 3; 4 Ann. c. 16, s. 17; 53 Geo. 3, c. 127, s. 5; 3 & 4 Will. 4, c. 27, ss. 40, 41, 42; and 3 & 4 Will. 4, c. 42, s. 3, "shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons, being at the time of such cause of action or suit accrued beyond the seas, or in the cases in which by virtue of any of the aforesaid enactments imprisonment is now a disability, by reason of such person or some one or more of such persons being imprisoned at the time of such cause of action or suit accrued." (*b*).

(*a*) See 19 & 20 Vict. c. 97, s. 10.

(*b*) 19 & 20 Vict. c. 97, s. 10. In *Cornill* v. *Hudson*, 8 E. & B. 429, Lord Campbell, C.J., observes, that the above 10th section of the Act prevents any action being commenced after the period has elapsed within which the right to bring the action is limited by statute irrespective of the circumstance that the plaintiff has been abroad or in prison. See *Townsend* v. *Deacon*, 3 Exch. 706.

Absence beyond seas of joint debtor.

Also by the next ensuing section of the Act just cited (*c*) it is further enacted that "where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid, or any of them, lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas; and such person or persons, so entitled as aforesaid, shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond seas at the time the cause of action or suit accrued after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid."

Judgment recovered against joint debtor.

Part payment by one contractor, &c., not to prevent bar by certain statutes of limitations in favour of another contractor, &c.

The 14th section also provides in reference to the 21 Jac. 1, c. 16, s. 3, and 3 & 4 Will. 4, c. 42, s. 3, that "when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator shall lose the benefit of the said enactments or any of them so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors or administrators." This section of

(*c*) 19 & 20 Vict. c. 97, s. 11.

period limitation runs, or the mode in which a claim may be taken out of the operation of the statute, or, when barred by any statute, may be revived by a subsequent promise or acknowledgment. These subjects will be found minutely treated of in works devoted to an exposition of the law of real property, and of contracts and mercantile transactions. There is, however, one maxim which naturally suggests itself in this place, and which is illustrated by those provisions in the different statutes of limitation, which, in the cases of infancy and coverture, and others similar, suspend their operation until removal of such disability. The maxim alluded to is expressed thus: *Contra non valentem agere nulla currit præscriptio*—prescription does not run against a party who is unable to act. For instance, in the case of a debt due, it only begins to run from the time when the creditor has a right to institute his suit, because no delay can be imputed to him before that time (*k*). Where, therefore, a debt is suspended by a condition; as, if the contract be to pay money at a future period, or upon the happening of a certain event, as, "when J. S. is married," the six years are to be dated, in the first instance, from the arrival of the specified period; in the second, from the time when the event occurred (*l*). Where, however, the breach of contract, which, in assumpsit, is the gist of the action (*m*), occurred more than six years before the com-

(*k*) 1 Pothier, by Evans, 451; *Hemp* v. *Garland*, 4 Q. B. 519, 524; *Flood* v. *Patterson*, 30 L. J., Chanc. 486; *Huggins* v. *Coates*, 5 Q. B. 432; *Holmes* v. *Kerrison*, 2 Taunt. 323; *Cowper* v. *Godmond*, 9 Bing. 748. See, also, *Davies* v. *Humphreys*, 6 M. & W. 153; Bell, Dict. and Dig. of Scotch Law, 223.

Where a loan is made by cheque the Statute of Limitations runs from the date of payment of the cheque; *Garden* v. *Bruce*, L. R. 3 C. P. 300.

(*l*) 1 Pothier, by Evans, 451; *Shutford* v. *Borough*, Godb. 437; *Fenton* v. *Emblers*, 1 W. Bla. 353.

(*m*) "The rule is firmly established

various actions which may be maintained by and against executors and administrators, as well as those rights of action which die with the person,—to which alone the above rule may be considered in strictness to apply.

Actions *ex contractu* by personal representatives.

The personal representatives are, as a general rule, entitled to sue on all covenants broken in the lifetime of the covenantee; as for rent then due, or for breach of covenant for quiet enjoyment (*r*), or to discharge the land from incumbrances (*s*). A distinction must, however, be remarked between a covenant running with the land, and one purely collateral. In the former case, where the formal breach has been in the ancestor's lifetime, but the substantial damage has taken place since his death, the real and not the personal representative is the proper plaintiff; whereas, in the case of a covenant not running with the land, and intended not to be limited to the life of the covenantee, as a covenant not to fell trees, excepted from the demise, the personal representative is alone entitled to sue (*t*). In a recent case, it was held, that the executor of a tenant for life may recover for a breach of a covenant to repair committed by the lessee of the testator in his lifetime, without averring a damage to his personal estate; and, in this case, the rule was stated to be, that unless the particular covenant be one for breach whereof, in the lifetime of the lessor, the *heir alone* can sue, the executor may sue, unless it be a mere

(*r*) *Lucy* v. *Levington*, 2 Lev. 26. By 13 Edw. 1, st. 1, c. 23, executors shall have a writ of account. In the stat. 31 Edw. 3, st. 1, c. 11, originated the office of administrator.

(*s*) *Smith* v. *Simonds*, Comb. 64.

(*t*) *Raymond* v. *Fitch*, 2 C. M. & R. 598, 599; *per* Williams, J., and Parke, B., *Beckham* v. *Drake*, 2 H. L. Cas. 596, 624; *per* Parke, J., *Carr* v. *Roberts*, 5 B. & Ad. 84; *Kingdon* v. *Nottle*, 1 M. & S. 355; 4 M. & S. 53; *King* v. *Jones*, 5 Taunt. 518; S. C. (in error), 4 M. & S. 188.

and, generally, with respect to injuries affecting the life or health of the deceased,—such, for instance, as arise out of the unskilfulness of a medical practitioner, or the negligence of an attorney, or a coach proprietor,—the maxim as to *actio personalis* is applicable, unless some damage done to the personal estate of the deceased be stated on the record (*c*). But, where the breach of a contract relating to the person occasions a damage, not to the person only, but also to the personal estate; as, for example, if in the case of negligent carriage or cure there was consequential damage—if the testator had expended his money, or had lost the profits of a business, or the wages of labour for a time; or if there were a joint contract to carry both the person and the goods, and both were injured; it seems a true proposition, that, in these cases, the executor might sue for the breach of contract, and recover damages to the extent of the injury to the personal estate (*d*).

Against representatives.

The personal representatives, on the other hand, are liable, as far as they have assets, on all the covenants and contracts of the deceased broken in his lifetime (*e*), and likewise on such as are broken after his death, for the due performance of which his skill or taste was not required (*f*), and which were not to be performed by the

(*c*) Judgm., 2 M. & S. 415, 416; *Beckham* v. *Drake*, 2 H. L. Cas. 579, 596, 624. See *Knights* v. *Quarles*, 2 B. & B. 104.

(*d*) Judgm., 8 M. & W. 854, 855.

(*e*) *Semble.* "Where a relation exists between two parties which involves the performance of certain duties by one of them, and the payment of reward to him by the other, the law will imply, or the jury may infer a promise by each party to do what is to be done by him;" and for breach of such a promise by deceased, his executors might sue; *Morgan* v. *Ravey*, 6 H. & N. 265, 276.

(*f*) *Per* Parke, B., *Siboni* v. *Kirkman*, 1 M. & W. 423; *per* Patteson, J., *Wentworth* v. *Cock*, 10 A. & E. 445, 446; *Hopwood* v. *Whaley*, 6

the stipulated period, his administrator refused to accept (*n*).

The action of *debt* on simple contract, except for rent (*o*), did not, however, formerly lie against the personal representative for a debt contracted by the deceased (*p*), unless the undertaking to pay originated with the representative (*q*); and the reason of this was, that executors or administrators, when charged for the debt of the deceased, were not admitted to wage their law, and, consequently, were deprived of a legal defence which the deceased himself might have made use of; but this reason did not apply to assumpsit, which, therefore might always have been brought (*r*). Now, however, by stat. 3 & 4 Will. 4. c. 42, s. 13, wager of law is abolished; and by sect. 14 it is enacted, that an action of debt on simple contract shall be maintainable in any court of common law against an executor or administrator.

Actions *ex delicto* by personal representatives.

It is, however, to actions in form *ex delicto* that the rule *Actio personalis moritur cum personâ* is peculiarly applicable; indeed, it has been observed that this maxim is not applied in the old authorities to causes of action on contracts, but to those in tort which are founded on malfeasance or misfeasance to the person or property of another; which latter are annexed to the person, and die with the person, except where the remedy is given to the personal representative by the statute law (*s*); *it*

(*n*) *Wentworth* v. *Cock*, 10 A. & E. 42.

(*o*) *Norwood* v. *Read*, Plowd. 180.

(*p*) *Barry* v. *Robinson*, 1 N. R. 293.

(*q*) *Riddell* v. *Sutton*, 5 Bing. 206.

(*r*) 3 Bla. Com. 16th ed., 347, and n. (12). In *Perkinson* v. *Gilford*, Cro. Car. 539, debt was held to lie against the executors of a sheriff, who had levied under a *fi. fa.*, and died without paying over the money. As to a set-off by an executor sued as such, see *Mardall* v. *Thellusson*, 6 E. & B. 976; S. C., 18 Q. B. 857.

(*s*) *Per* Lord Abinger, C.B., 2 C., M., & R. 597.

session of them from that time, though before probate granted (*b*). The title of an administrator, however, is derived from the letters of administration, though it has relation back, for many purposes, to the date of the death; for instance, trespass has been held maintainable by an administrator for an act done between the death and the grant of the letters of administration (*c*). Detinue, however, will not lie by an administrator for goods of the intestate, which the defendant has re-delivered prior to the grant of administration (*d*).

In regard to the doctrine of relation just mentioned, we may add in the words of a very learned judge, that "an act done by one who afterwards becomes administrator to the *prejudice* of the estate, is not made good by the subsequent administration. It is only in those cases where the act is for the *benefit* of the estate, that the relation back exists, by virtue of which relation the administrator is enabled to recover against such persons as have interfered with the estate, and thereby to prevent it from being prejudiced and despoiled" (*e*).

Previously to the stat. 3 & 4 Will. 4, c. 42, no remedy was provided for injuries to the real estate of any person deceased committed in his lifetime (*f*); but sect. 2 of that statute enacts, that an action of trespass, or trespass on the case, as the case may be, shall be maintainable by the executors or administrators of any person deceased, for any

(*b*) Judgm., *Pemberton* v. *Chapman*, 7 E. & B. 217; citing *Smith* v. *Milles*, 1 T. R. 480.

(*c*) *Tharpe* v. *Stallwood*, 5 M. & Gr. 760; recognised *Foster* v. *Bates*, 12 M. & W. 227. See *Welchman* v. *Sturgis*, 13 Q. B. 552. In *Bodger* v. *Arch*, 10 Exch. 333, the doctrine of relation was also held applicable, under peculiar circumstances, so as to prevent the operation of the Statute of Limitations. See *per* Parke, B., *Id.* 339, 340.

(*d*) *Crossfield* v. *Such*, 8 Exch. 825.

(*e*) *Per* Parke, B., *Morgan* v. *Thomas*, 8 Exch. 307.

(*f*) 1 Wms. Saund. 217, n.

injury to the real estate of such person committed in his lifetime, for which an action might have been maintained by such person, provided such injury shall have been committed within six calendar months before the death of such deceased person, and such action be brought within one year after the death of such person. This proviso seems to apply where the action commenced in the lifetime of the testator, is continued by his executors, after his death, the acts complained of being committed more than six months before his death (*g*).

Notwithstanding the statutory exceptions above noticed to the general rule which was recognised by the common law, the rule still applies where a tort is committed to a man's person, feelings, or reputation, as for assault, libel, slander, or seduction of his daughter: in such cases no action lies at suit of the executors or administrators, for they represent not so much the person as the personal estate of the testator or intestate, of which they are in law the assignees (*h*).

Again, prior to the 9 & 10 Vict. c. 93, (amended by 27 & 28 Vict. c. 95,) an action was not maintainable against a person who, by his wrongful act, occasioned the death of another; but by sect. 1 of that statute it is enacted, that "whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect thereof (*i*), then

9 & 10 Vict. c. 93.

(*g*) *Kirk* v. *Todd*, 21 Ch. Div. 484.

(*h*) 3 Bla. Com. 16th ed., 302, n. (9); Com. Dig. "*Administration*," (B. 13).

(*i*) These words have reference, "not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose, and the nature of the wrongful act, neglect, or default complained of:" thus, if the deceased had by his

and in every such case the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." By sect. 2, it is further enacted, that "every such action shall be for the benefit of the wife, husband, *parent* (*k*), and *child* (*l*), of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; or if there be no executor or administrator of the deceased, or such action as aforesaid be not brought within six calendar months after his death, then it may be brought in the name or names of all or any of the persons for whose benefit the personal representatives of the deceased would have sued (*m*). In every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, in such shares as the jury by their verdict shall find and direct." And by sect. 3, the action for damages must be brought within twelve calendar months after the death of such deceased person. It will be observed, that this statute

own negligence materially contributed to the accident whereby he lost his life, inasmuch as he, if living, could not have maintained an action for damages, although there had been negligence on the part of the defendant, an action would not lie under the statute; *Pym* v. *Great Northern R. C.*, 2 B. & S. 759, 767.

(*k*) S. 5.

(*l*) *Id.*; see *Dickinson* v. *North Eastern R. C.*, 2 H. & C. 735.

(*m*) 27 & 28 Vict. c. 95, s. 1; see also s. 2; *Read* v. *Great Eastern R. C.*, L. R. 3 Q. B. 555; *et vide* stat. 31 & 32 Vict. c. 119, ss. 25, 26.

only applies where death ensues from the particular wrongful act, and does not, therefore, affect the class of cases above mentioned, *viz.*, where a tort is committed to the person which does not occasion death (*n*).

Against personal representatives.

By the statute 3 & 4 Will. 4, c. 42, s. 2, already mentioned, trespass and case will also lie against personal representatives for any wrong committed by any person deceased, in his lifetime, to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six months after the executors or administrators shall have taken upon themselves the administration of the estate and effects of such person (*o*). Prior to this Act, the remedy for a tort to the property of another, real or personal, by an action in form *ex delicto*,—such as trespass, trover, or case for waste, for diverting a water-course, or obstructing lights,—could not have been enforced against the personal representatives of the tort-feasor unless advantage accrued to the latter (*p*); and, even now, no action can be maintained against them under that statute for a personal tort committed by him (*q*).

(*n*) See, further, as to the operation of the above statute, Broom's Com. Law.

(*o*) With reference to this statute see *Richmond* v. *Nicholson*, 8 Scott, 134; *Powell* v. *Rees*, 7 A. & E. 426.

(*p*) 1 Wms. Saund. 216 n. (1). See *Bacon* v. *Smith*, 1 Q. B. 348. Where chattels, wrongfully in the possession of testator, continued *in specie* in the hands of his executor, replevin or detinue would have been maintainable to recover the specific goods; Bro. Abr. "*Detinue*," pl. 19; *Le Mason* v. *Dixon*, Sir W. Jones, 173, 174. See *Crossfield* v. *Such*, 8 Exch. 825, and *infra*, 867.

(*q*) 1 Wms. Saund. 216, n. (1); Com. Dig. "*Administration*," (B. 15); 2 Inst. 382; *Ireland* v. *Champneys*, 4 Taunt. 884. By stats. 30 Car. 2. st. 1, c. 7, and 4 & 5 Will. & M., c. 24, s. 12, the representatives of an executor or administrator who has committed waste are rendered liable: see *Huntley* v. *Russell*, 13 Q. B. 572.

As to the liability of the executor

Cases, however, do occur where an action founded in tort will (*r*), independently of the above Act, lie against the executor (*s*). For instance, the executors of an innkeeper have been held answerable for the value of articles lost by the plaintiff whilst staying in the inn kept by the deceased (*t*).

In a recent case, where the question arose, whether the reigning sovereign was liable to make compensation for a wrong done by the servants and during the reign of his predecessor: Lord *Lyndhurst*, C., observed, that if the case had been between subject and subject, an action could not have been supported, upon the principle that *Actio personalis moritur cum personâ:* and, although it was contended that a different rule prevails where the sovereign is a party, that some authority should be adduced for such a distinction (*u*).

For a tort committed to the person, it is clear, then, that at common law no action can be maintained against the personal representatives of the tort-feasor, nor does the stat. 9 & 10 Vict. c. 93, as amended by 27 & 28 Vict. c. 95, supply any remedy against the *executors* or *administrators* of the party who, by his "wrongful act, neglect, or default," has caused the death of another; for the first section of this Act renders that person liable to an action for damages, "who would have been liable if death had not ensued," in which case, as already stated, the personal representatives of the tort-feasor would *not* have been liable.

of an executor for a *devastavit* by the latter, see *Coward* v. *Gregory*, L. R. 2 C. P. 153.

(*r*) *Ante*, p. 866, n. (*r*).

(*s*) *Per* Lord Mansfield, C.J., *Hambly* v. *Trott*, 1 Cowp. 373; recognised, 4 B. & Ad, 829.

(*t*) *Morgan* v. *Ravey*, 6 H. & N. 265. See stat. 26 & 27 Vict. c. 41.

(*u*) *Viscount Canterbury* v. *A.-G.*, 1 Phill. 322.

against those who represented his estate. The reader is referred to the judgment of *Cotton*, L.J., which contains an exhaustive review of the legal history of the maxim under consideration (*z*).

Action by a master whose servant has been killed on the spot.

The question whether a master has a right of action in respect of injuries to his servant which result in the instant death of the latter was discussed and answered in the negative in the case of *Osborn* v. *Gillett* (*a*). As the present Lord *Bramwell* dissented from the view expressed by the majority of the Court, it has been thought desirable to consider somewhat carefully the decisions and principles of law applicable to the subject. The ancient reason of the rule that the master cannot recover seems to have been this, that the servant dying of the extremity of a battery, it became an offence to the Crown, being converted into a felony, and that drowned the particular offence and private wrong previously offered to the master, and his action was thereby lost (*b*). This reason appears practically to be no longer good law since the recent cases of *Ex pte. Ball* and the *Midland Insurance Co.* v. *Smith* (*c*), and the decision in *Osborn* v. *Gillett*, would appear to depend for its correctness on the *nisi prius* decision of Lord *Ellenborough* in *Baker* v. *Bolton* (*d*), in which it was laid down as law that in a *civil* court the death of a human being could not be complained of as an injury. If the ground for this statement is, as it seems it must be, that death can only be complained of as a civil

(*z*) By the Rules of Court, 1883, O. 17. r. 1; a cause or matter, whether the cause of action survive or not, shall not abate by reason of the death of either party between the verdict and judgment.

(*a*) L. R. 8 Exch. 88.

(*b*) *Higgins* v. *Butcher*, Yelv. 90.

(*c*) 10 Ch. D. 667; 6 Q. B. D. 561; 50 L. J. Q. B. 41; *Roope* v. *D'Avigdor*, 10 Q. B. D. 412.

(*d*) 1 Camp. 493.

injury if caused by negligence, and that if so caused it amounts to a felony, which merges the civil remedy by action, the answer appears to be twofold,—first, that possibly there may be a killing under circumstances of sufficient negligence to maintain an action if death had not ensued, though the negligence is not criminal so as to render the killing manslaughter (*e*); and secondly, that even assuming the negligence to be criminal so as to render the killing manslaughter, yet the civil remedy by action for the loss of service is not thereby merged in or suspended until criminal proceedings for the death have been taken (*f*). It is submitted, therefore, that the authorities and reasoning upon which the decision in *Osborn* v. *Gillett*, rests are no longer the law, and that an action is maintainable by a master for the loss of the services of his servant by reason of the instantaneous death of the latter, brought about by the defendant's negligence.

It may be observed, in concluding this subject, that cases have occurred, *ex. gr.*, respecting the right of action by or against a feme covert (*g*), surviving her husband, for an injury to her person or property, or for her tortious act committed before or during coverture,—which are exceedingly similar in principle and analogous to those which have been here cited and commented on. It cannot, however, be said with propriety that the maxim above illustrated is *strictly* applicable to such cases; and it has, therefore, been thought better to confine our attention to those in which the right of action or liability either sur-

(*e*) Per Bramwell, B., *Osborn* v. *Gillett*, L. R. 8 Ex., at p. 93.

(*f*) *Supra*, p. 868.

(*g*) See *per* Erle, C.J., *Capel* v. *Powell*, 17 C. B. N. S. 747.

vives the death of the party, or, in the words of the maxim, *moritur cum personâ* (*h*).

(*h*) As to actions by and against the executors of a parson in respect of waste and dilapidations, see *Ross* v. *Adcock*, L. R. 3 C. P. 655; *Bunbury* v. *Hewson*, 3 Exch. 558; *Warren* v. *Lugger*, *Id.* 579; *Bryan* v. *Clay*, 1 E. & B. 38; *Martin* v. *Roe*, 7 E. & B. 237; *Wise* v. *Metcalfe*, 10 B. & C. 299. In *Bird* v. *Relph*, 4 B. & Ad. 830, Patteson, J., observes, that "the action against the executor of a parson for dilapidations is an anomalous action, and appears like an exception to the general rule that '*Actio personalis moritur cum personâ.*'" See, also, *Gleaves* v. *Parfitt*, 7 C. B. N. S. 838.

CHAPTER X.

MAXIMS APPLICABLE TO THE LAW OF

WE have in a previous Chapter, inves
rules of the law of evidence which relate p
interpretation of written instruments; it
these concluding pages, to state some
rules of evidence. Very little, however,
attempted beyond a statement and brief
them; because, on reflection, it appeared d
to refer the reader to treatises of acknowle
on the subject, from which, after patient c
the more important cases there indicated,
tion of the extensive applicability of the fol
can alone be derived.

OPTIMUS INTERPRES RERUM USUS. (2
Usage is the best interpreter of th

Custom, *consuetudo*, is a law not writte
by long usage and the consent of our ance
hence it is said that usage, *usus*, is the leg
custom (*b*). Moreover, where a law is esta
implied consent, it is either common law

(*a*) Jacob, Law Dict., tit. "*Custom.*"

(*b*) *Per* Bayley
440.

universal, it is *common law* (*c*); if particular to this or that place, then it is *custom*. When any practice was, in its origin, found to be convenient and beneficial, it was naturally repeated, continued from age to age, and grew into a law, either local or national (*d*). A custom, therefore, or customary law, may be defined to be an usage which has obtained the force of law, and is, in truth, the binding law within a particular district, or at a particular place, of the persons and things which it concerns (*e*): *Consuetudo loci est observanda* (*f*).

Custom, when good

There are, however, several requisites to the validity of a custom, which can here be but briefly specified.

First, it must be *certain*, or capable of being reduced to a certainty (*g*). Therefore, a custom that lands shall descend to the most worthy of the owner's blood, is void for how shall this worth be determined? but a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good. And a custom to

(*c*) "In point of fact, the common law of England, *lex non scripta*, is nothing but custom;" Judgm., *Nunn* v. *Varty*, 3 Curt. 363. But the claim of any particular place to be exempt from the obligation imposed by the common law, may also be properly called a custom. *Id.*

(*d*) 3 Salk. 112. *Ex non scripto jus venit quod usus comprobavit; nam diuturni mores consensu utentium comprobati legem imitantur*; I. 1. 2. 9. *Consuetudinis jus esse putatur id quod voluntate omnium sine lege vetustas comprobavit*—Cic. de Invent. ii. 22.

(*e*) *Le Case de Tanistry*, Davys, R. 31, 32; cited Judgm., 9 A. & E. 421; and in *Rogers* v. *Brenton*, 10 Q. B. 26, 63.

(*f*) 6 Rep. 67; 10 Rep. 139. See *Busher*, app., *Thompson*, resp., 4 C. B. 48.

(*g*) *Bluett* v. *Tregonning*, 3 A. & E. 554, 575 (where the custom alleged was designated, *per* Williams, J., as "uncertain, indefinite, and absurd"); *Constable* v. *Nicholson*, 14 C. B. N. S. 230; *A.-G.* v. *Mathias*, 27 L. J., Chanc., 761; *Padwick* v. *Knight*, 7 Exch. 854; *Wilson* v. *Willes*, 7 East, 121; *Broadbent* v. *Wilkes*, Willes, 360; S. C. (in error), 1 Wils. 63 (which also shows that a custom must be *reasonable*); with this case compare *Rogers* v. *Taylor*, 1 H. & N. 706 *Carlyon* v. *Lovering*, *Id.* 784.

Further, a custom is not necessarily unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth; as the custom to turn the plough upon the headland of another, which is upheld in favour of husbandry; or to dry nets on the land of another, which is likewise upheld in favour of fishing and for the benefit of navigation (*p*). So, a custom the exercise of which causes interruption to a highway for a beneficial purpose and during a limited time may be reasonable (*q*). And a custom that the tenant shall have the way-going crop after the expiration of his term (*r*), or that a tenant, who is bound to use a farm in a good and tenantable manner and according to the rules of good husbandry, shall be at liberty on quitting the farm to charge his landlord with a portion of the expense of draining land which needs drainage according to the rules of good husbandry, though the drainage be done without his landlord's knowledge or consent (*s*), is not unreasonable (*t*). So, a custom for the

(*p*) Judgm., *Tyson* v. *Smith* (in error), 9 A. & E. 421; Co. Litt. 33, b. See *Lord Falmouth* v. *George*, 5 Bing. 286, 293. A custom for all the inhabitants of B., as such, to enter the close of the plaintiff and take fish there without limit would be bad: *Lloyd* v. *Jones*, 6 C. B. 81, 89; citing *Gateward's case*, 6 Rep. 60, b.; *A.-G.* v. *Mathias*, 27 L. J. Chanc., 761. See *Mounsey* v. *Ismay*, 1 H. & C. 729; 3 *Id.* 486.

A custom for the inhabitants of a parish to exercise and train horses at all seasonable times of the year in a place beyond the limits of the parish, is bad; *Sowerby* v. *Coleman*, L. R. 2 Ex. 96.

(*q*) *Elwood* v. *Bullock*, 6 Q. B. 383.

(*r*) *Wigglesworth* v. *Dallison*, Dougl. 201; S. C., 1 Smith L. C., 8th ed., 606, and Note thereto.

(*s*) *Mousley* v. *Ludlam*, 21 L. J., Q. B., 64; *Dalby* v. *Hirst*, 1 B. & B. 224.

In *Cuthbert* v. *Cumming*, 10 Exch. 809; S. C., 11 Exch. 405, a question arose as to the reasonableness of an alleged usage of trade. See *Grissell* v. *Bristowe*, L. R. 4 C. P. 36; *Cropper* v. *Cook*, L. R. 3 C. P. 194; *Baines* v. *Ewing*, L. R. 1 Ex. 320.

(*t*) *The Marquis of Salisbury* v. *Gladstone*, 9 H. L. Cas. 692, and followed in *Blewett*, app.,

but, if it be grounded, not upon reason, but error, it is not the will of the people (*c*), and to such a custom the established maxim of law applies, *Malus usus est abolendus* (*d*)—an evil or invalid custom ought to be abolished.

Thirdly, the custom must have existed from time immemorial (*e*); so that, if any one can show its commencement, it is no good custom (*f*), but the law has laid down no rule as to the extent of evidence which is required to establish a custom, or from which the presumption or inference of the fact of a custom may be rightly drawn. It is the province of a jury to draw these conclusions of fact (*g*).

Fourthly, the custom must have continued without any

(*c*) See Taylor, Civ. Law, 3rd ed., 245, 246; Noy, Max., 9th ed., p. 59, n. (*a*); *Id.* 60.

(*d*) Litt. s. 212; 4 Inst. 274. *Hilton* v. *Earl Granville*, 5 Q. B. 701 (which is an important case with reference to the reasonableness of a manorial custom or prescriptive right), commented on, but followed in *Blackett* v. *Bradley*, 1 B. & S. 940, 954, practically overruled in *Gill* v. *Dickinson*, 5 Q. B. D., p. 159; 49 L. J. Q. B. 262. See, also, *Rogers* v. *Taylor*, 1 H. & N. 706; *Clayton* v. *Corby*, 5 Q. B. 415 (where a prescriptive right to dig clay was held unreasonable); cited *per* Lord Denman, C. J., 12 Q. B. 845; *Gibbs* v. *Flight*, 3 C. B. 581; *Bailey* v. *Stephens*, 12 C. B. N. S. 91; *Constable* v. *Nicholson*, 14 C. B. N. S. 230, 241. In *Lewis* v. *Lane*, 2 My. & K. 449, a custom inconsistent with the doctrine of resulting trusts was held to be unreasonable.

"The Superior Courts have at all times investigated the customs under which justice has been administered by local jurisdictions; and, unless they are found consonant to reason and in harmony with the principles of law, they have always been rejected as illegal;" Judgm., *Cox* v. *Mayor of London*, 1 H. & C. 358; S. C., L. R. 2 H. L. 239.

(*e*) See, as to proofs whence immemorial usage, or the legal origin of a toll, may be presumed, *Holford*, app., *George*, resp., L. R. 3 Q. B. 639, 649, 650; *Bryant* v. *Foot*, *Id.* 497; *Lawrence* v. *Hitch*, *Id.* 521; *Shephard* v. *Payne*, 16 C. B. N. S. 132; *Foreman* v. *Free Fishers of Whitstable*, L. R. 4 H. L. 266, and cases there cited.

(*f*) 1 Com. by Broom & Hadley 68. The above requisite of a good custom is, however, qualified by the Prescription Act, 2 & 3 Will. 4, c. 71.

(*g*) *Hanmer* v. *Chance*, 4 De G. J. & S. 626, 34 L. J. Ch. 413.

interruption; for any interruption would cause a temporary cessation of the custom, and the revival would give it a new beginning, which must necessarily be within time of memory, and consequently the custom will be void. But this must be understood with regard to an interruption of the *right;* for an interruption of the possession only, for ten or twenty years, will not destroy the custom. As, if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed though they do not use it for ten years: it only becomes more difficult to prove; but, if the right be in any way discontinued for a single day, the custom is quite at an end (*h*).

Fifthly, the custom must have been *peaceably enjoyed* and *acquiesced in*, not subject to contention and dispute. For, as customs owe their origin to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting (*i*).

Sixthly, a custom, though established by consent, must, when established, be *compulsory*, "and not left to the option of every man whether he will use it or no. Therefore a custom that all the inhabitants shall be rated towards the maintenance of a bridge will be good; but a custom that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all" (*k*).

Seventhly, customs existing in the same place "must be *consistent with each other;* one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both esta-

(*h*) 1 Com. by Broom & Hadley, 69.

(*i*) *Id. ibid.*

(*k*) 1 Com. by Broom & Hadley, 73.

blished by mutual consent: which to say of contradictory customs is absurd" (*l*).

Eighthly, customs in derogation of the common law, or of the general rights of property, must be strictly construed (*m*).

Ninthly, if it is sought to attach a custom to a written contract or agreement it must not be inconsistent therewith, therefore where by the terms of a charter-party a ship was to proceed to a certain port, or so near thereinto as she could get, and there discharge her cargo as customary, it was decided that a custom of the port by which the charterer was only bound to take delivery at the port, and not at a place as near thereto as the vessel could safely get was bad, as being inconsistent with the written contract (*n*).

Where, then, continued custom has acquired the force of an express law (*o*), reference must of course be made to such custom in order to determine the rights and liabilities of parties, arising out of transactions which are affected by it; *Optimus interpres rerum usus.* This maxim is, however, likewise applicable to many cases, and under many circumstances, which are quite independent of customary law in the sense in which that term has been here used, and which are regulated by mercantile usage and the peculiar rules recognised by merchants.

Usage of trade.

The law merchant, it has been observed, forms a branch of the law of England, and those customs which have been

(*l*) 1 Com. by Broom & Hadley, 73.

(*m*) *Id.*; Judgm., 10 Q. B. 57; *per* Bayley, J., 2 B. & C. 839. See as to the above rule, *per* Cockburn, C. J., 2 H. & N. 680, 681.

(*n*) *Hayton* v. *Trevin*, 5 C. P. D. 130; 41 L. J. Q. B. 661; *The Alhambra*, 6 C. P. D. 68; 50 L. J. P. 36.

(*o*) See Judgm., 9 A. & E. 425, 426.

by any local custom, or amongst particular classes, acquired a peculiar sense, distinct from the popular sense of the same words, their meaning may be ascertained by reference to that usage or custom (*s*). And the question in such cases usually is, whether there was a recognised practice and usage with reference to the transaction out of which the written contract between the parties arose, and to which it related, which gave a particular sense to the words employed in it, so that the parties might be supposed to have used such words in that particular sense. "The character and description of evidence admissible for that purpose" being "*the fact* of a general usage and practice prevailing in that particular trade or business, not the judgment and opinion of the witnesses, for the contract may be safely and correctly interpreted by reference to the fact of usage, as it may be presumed such fact is known to the contracting parties, and that they contract in conformity thereto; but the judgment or opinion of the witnesses called affords no safe guide for interpretation, as such judgment or opinion is confined to their own knowledge" (*t*).

The following examples must here suffice in illustration of the subject just adverted to (*u*), and in the margin will be found references to a few cases, showing the operation of the well-known rule stated above, that evidence of usage —mercantile or otherwise—cannot be admitted to *vary* a written contract (*x*).

(*s*) Judgm., *Robertson* v. *French*, 4 East, 135. See *Carter* v. *Crick*, 4 H. & N. 412.

(*t*) Judgm., *Lewis* v. *Marshall*, 8 Scott, N. R. 493; *Russian Steam Nav. Co.* v. *Silva*, 13 C. B. N. S. 610.

As to mercantile words see also *Peek* v. *North Staffordshire R. C.*, 10 H. L. Cas. 543.

(*u*) See further on this subject, Broom's Com., 5th ed., Bk. II. Chap. 4.

(*x*) In the under-mentioned cases,

custom has been frequently proved as a fact in and recognised by the Courts as a binding custom in a particular trade they will take judicial notice of it (*z*). Thus, for example, the custom of letting out furniture on what is called the hiring system has been so frequently proved that the Courts have taken judicial notice of it in questions arising on the reputed ownership clauses in the statutes relating to bankruptcy (*a*).

Where evidence of an established local usage—as on the stock exchange of a particular town (*b*)—is admitted to add to or to affect the construction of a written contract, it is admitted on the ground that the contracting parties are both cognisant of the usage, and must be presumed to have made their agreement with reference to it; and it would seem that if a person employs another to transact business for him in a particular market, being ignorant of its usages he will nevertheless be bound thereby, provided the same are reasonable, and do not change the intrinsic nature of the employment, but merely regulate its performance (*c*).

applied to palm-oil, *Warde* v. *Stuart*, 1 C. B. N. S. 88; "in regular turns of loading," *Leidemann* v. *Schultz*, 14 C. B. 38; (with which compare *Hudson* v. *Clementson*, 18 C. B. 213).

(*z*) See the observations and cases collected in the note to *Wigglesworth* v. *Dallison*, Smith's L. C., 8th ed., 606, *et seq.*

(*a*) *Crawcour* v. *Salter*, 18 Ch. Div. 30; *Whitfield* v. *Brown*, 16 M. & W.; where the Court appears to have judicially noticed the custom for bookbinders to have in their shops books for sale on commission.

(*b*) *Bayliffe* v. *Butterworth*, 1 Exch. 425; *Pollock* v. *Stables*, 12 Q. B. 765; *Bayley* v. *Wilkins*, 7 C. B. 886; *Taylor* v. *Stray*, 2 C. B. N. S. 174; *Cropper* v. *Cook*, L. R. 3 C. P. 194, 198; *Viscount Torrington* v. *Lowe*, L. R. 4 C. P. 26; *Grissell* v. *Bristowe*, *Id.* 36; *Maxted* v. *Paine*, L. R. 4 Ex. 81, 203; *Davis* v. *Haycock*, L. R. 4 Ex. 373; *Kidston* v. *Empire Mar. Ins. Co.*, L. R. 1 C. P. 535, L. R. 2 C. P. 357; *Chapman* v. *Shepherd*, L. R. 2 C. P. 228.

(*c*) *Robinson* v. *Mollett*, L. R. 7 H. L. 836; and for a case where one contracting party was bound by a custom of a port of which he was ignorant; *King* v. *Hinde*, 12 L. R. Ir. 113.

There is also another extensive class of decisions in which evidence of usage is admitted to explain and construe ancient grants or charters, or to support claims not incompatible therewith (*d*). Nor is there any difference in this respect between a private deed and the king's charter (*e*): in either case, evidence of usage may be given to expound the instrument, provided such usage is not inconsistent with, or repugnant to, its express terms (*f*). So, the immemorial existence of certain rights or exemptions, as a modus or a claim to the payment of tolls, may be inferred from uninterrupted modern usage (*g*).

Generally, as regards a deed (as well as a will),—the state of the subject to which it relates at the time of execution, may be inquired into; and where a deed is ancient, so that the state of the subject-matter or its date cannot be proved by direct evidence, evidence of the mode in which the property in question has been held and enjoyed is admissible; as where the question was whether the soil or merely the herbage passed under the

(*d*) *Bradley* v. *Pilots of Newcastle*, 2 E. & B. 427; *Duke of Beaufort* v. *Mayor of Swansea*, 3 Exch. 413, 435; and cases cited; *Attorney-Gen.* v. *Drummond*, 1 Dru. & War. 353; 2 H. L. Cas. 837; *Shore* v. *Wilson*, 9 Cl. & Fin. 569.

(*e*) "All charters or grants of the Crown may be repealed or revoked when they are contrary to law, or uncertain or injurious to the rights and interests of third persons, and the appropriate process for the purpose is by writ of *scire facias*." Judgm., *Reg.* v. *Hughes*, L. R. 1 P. C. 87.

(*f*) *Per* Lord Kenyon, C.J., *Withnell* v. *Gartham*, 6 T. R. 398; *R.* v. *Salway*, 9 B. & C. 424, 435; *Stammers* v. *Dixon*, 7 East, 200; *per* Lord Brougham, C., *A.-G.* v. *Brazen Nose Coll.*, 2 Cl. & Fin. 317; *per* Tindal, C.J., 8 Scott, N. R. 813.

(*g*) See *per* Parke, B., *Jenkins* v. *Harvey*, 1 Cr., M. & R. 894; *per* Richardson, J., *Chod* v. *Tilsed*, 2 B. & B. 409; *Foreman* v. *Free Fishers of Whitstable*, L. R. 4 H. L. 266, and cases there cited; *Earl of Egremont* v. *Saul*, 6 A. & E. 924; *Brune* v. *Thompson*, 4 Q. B. 543.

term "pastura" contained in an ancient admission as entered on the court rolls of a manor, evidence was received to show that the tenants had for a long series of years enjoyed the land itself (*h*), the manner in which the subject to which it refers has been possessed or used—*Optimus interpres rerum usus* (*i*).

Statutes.

Lastly, evidence of usage is likewise admissible to aid in interpreting Acts of Parliament, the language of which is doubtful; for *jus et norma loquendi* are governed by usage. The meaning of things spoken or written must be such as it has constantly been received to be by common acceptation (*k*), and that exposition shall be preferred, which, in the words of Sir E. *Coke* (*l*) is "approved by constant and continual use and experience:" *Optima enim est legis interpres consuetudo* (*m*). Thus, the Court was influenced in its construction of a statute of Anne, by the fact that it was that which had been generally considered the true one for one hundred and sixty years (*n*).

Remarks of Mr. Justice Story respecting usage.

We shall conclude these very brief remarks upon the maxim *Optimus interpres rerum usus* in the words of Mr. Justice *Story*, who observes, "The true and appropriate office of a usage or custom is, to interpret the other-

(*h*) *Doe* v. *Bevis*, 7 C. B. 456; cited in Taylor on Evidence, 7th ed., p. 1006.

(*i*) *Per* Lord Wensleydale, *Waterpark* v. *Furnell*, 7 H. L. Cas. 684; citing *Weld* v. *Hornby*, 7 East, 199; *Duke of Beaufort* v. *Swansea*, 3 Exch. 413; *A.-G.* v. *Parker*, 1 Ves. 43; 3 Atk. 576; *per* Lord St. Leonards, *A.-G.* v. *Drummond*, 1 Dru. & W. 368. See the maxim as to *contemporanea expositio*, *ante*, p. 638. As to construing the rubrics and canons see *Martin* v. *Mackonochie*, L. R. 2 A. & E. 195.

(*k*) Vaughan, R., 169; *per* Crowder, J., *The Fermoy Peerage*, 5 H. L. Cas. 747; Arg., *R.* v. *Bellringer*, 4 T. R. 819.

(*l*) 2 Inst. 18.

(*m*) D. 1. 3. 37; *per* Lord Brougham, 3 Cl. & Fin. 354.

(*n*) *Cox* v. *Leigh*, L. R. 9 Q. B. 333; 43 L. J. Q. B. 123; and see Maxwell's interpretation of statutes, p. 271.

wise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *à fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts; but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate declarations of the parties" (*o*).

CUILIBET IN SUA ARTE PERITO EST CREDENDUM. (*Co. Litt.* 125. *a.*)—*Credence should be given to one skilled in his peculiar profession.*

Necessity of rule.

Almost all the injuries, it has been observed, which one individual may receive from another, and which lay the

(*o*) *The Schooner Reeside*, 2 Sumner (U.S.), R. 567.

formulation of numberless actions involve in them questions peculiar to the trades and occupations of the parties: and, in these cases, the jury must, according to the above maxim, attend to the witnesses and decide according to their number, professional skill, and means of knowledge. Thus, in an action against a surgeon for ignorance, the question may turn on a nice point of surgery. In an action on a policy of life insurance, physicians must be examined. So, for injuries to a mill worked by running water, and occasioned by the erection of another mill higher up the stream, mill-wrights and engineers must be called as witnesses. In like manner, many questions respecting navigation arise, which must necessarily be decided by a jury, as in the ordinary case of deviation on a policy of marine insurance, of seaworthiness, or where one ship runs down another at sea in consequence of bad steering (*p*).

Evidence as to matters of science, &c.

Respecting matters, then, of science, trade (*q*), and others of the same description, persons of skill may not only speak as to facts, but are even allowed to give their opinions in evidence (*r*), which is contrary to the general rule, that the opinion of a witness is not evidence. Thus the opinion of medical men is evidence as to the state of a patient whom they have seen; and even in cases where they have not themselves seen the patient, but have heard the symptoms and particulars of his state detailed by other witnesses at the trial, their opinions on the nature of such symptoms have been admitted (*s*). In

(*p*) *Johnstone* v. *Sutton* (in error), 1 T. R. 538, 539.

(*q*) The importance attached to the *lex mercatoria*, or custom of merchants, and the implied warranty by a skilled labourer, artizan, or artist, that he is reasonably competent to the task he undertakes, may be referred to the maxim *supra*.

(*r*) 1 Stark. Ev., 4th ed., 173, 175; Stark. Ev., 4th ed., 96, 273.

(*s*) 1 Phil. Ev., 10th ed., 521.

tion becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

Insurance.

Further, on the principle expressed by the maxim, *Cuilibet in suâ arte perito est credendum*, ship-builders have been allowed to state their opinions as to the sea-worthiness of a ship from examining a survey which had been taken by others, and at the taking of which they were not present; and the opinion of an artist is evidence as to the genuineness of a picture (*x*). But, although witnesses conversant with a particular trade may be allowed to speak to a prevailing practice in that trade, and although scientific persons may give their opinion on matters of science, it has been expressly decided that witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably have been influenced if particular parties had acted in one way rather than another (*y*). For instance, in an action on a policy of insurance, where a broker stated, on cross-examination,

(*x*) Phil. Ev., 10th ed., 522, So evidence as to the genuineness of handwriting given by a witness possessing the requisite experience and skill is admissible, although little or no weight has, by many judges, been thought to be due to testimony of this description. 2 Phil. Ev., 10th ed., 308; *Doe* d. *Mudd.* v. *Suckermore*, 5 A. & E. 703; *Doe* d. *Jenkins* v. *Davies*, 10 Q. B, 314. See *Brookes* v. *Tichbourne*, 5 Exch. 929, 931; *Newton* v. *Ricketts*, 9 H. L. Cas. 262.

And now by stat. 17 & 18 Vict. c. 125, s. 27, it is enacted that "comparison of a disputed writing with any writing *proved to the satisfaction of the judge to be genuine* shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."

(*y*) Judgm., 5 B. & Ad. 846. See, also, *Greville* v. *Chapman*, 5 Q. B. 731; as to this case see Taylor on Evidence, 7th ed., 1193.

to without objection (*f*), and probably the view taken by the Common Pleas in the cases referred to would now be upheld as the correct one.

Where the fixing the fair price and value upon a contract to insure, is a matter of skill and judgment, and must be effected according to certain general rules and principles of calculation applied to the particular circumstances of each individual case, it seems to be matter of evidence to show whether the fact suppressed would have been noticed as a term in the particular calculation. In some instances, moreover, the materiality of the fact withheld would be a question of pure science; in others, it is very possible that mere common sense, although sufficient to comprehend that the disclosure was material, would not be so to understand to what extent the risk was increased by that fact; and, in intermediate cases, it seems difficult in principle wholly to exclude evidence of the nature alluded to, although its importance may vary exceedingly according to circumstances (*g*). Thus, it has been said (*h*), that the time of sailing *may* be very material to the risk. How far it is so must essentially depend upon the nature and length of the voyage, the season of the year, the prevalence of the winds, the conformation of the coasts, the usages of trade as to navigation and touching and staying at port, the objects of the enterprise, and other circumstances, political and otherwise, which may retard or advance the general progress of the voyage.

(*f*) Arnould, Mar. Ins., 5th ed., 581; *Ionides* v. *Pinder*, L. R. 9 Q. B. 531, at p. 535; 43 L. J. Q. B. 227.

(*g*) 3 Stark. Ev., 3rd ed., 887, 888.

(*h*) *Per* Story, J., delivering judgment, *M'Lanahan* v. *Universal Insurance Co.*, 1 Peters (U. S.), R. 188.

accordingly (*i*). In a more recent case it has been held that the mercantile custom or usage of a foreign country bearing on any particular subject may be proved by one who, though not a lawyer by profession, nor having filled any official appointment as judge, advocate, or solicitor, can satisfy the Court that he had special and peculiar means of acquiring knowledge respecting it (*k*). Thus, for example, the Court has allowed the law of a foreign country to be proved by the evidence of a secretary to the embassy of that country (*l*).

Lastly, although in accordance with the principal maxim, a skilled witness may be examined as to mercantile usage, or as to the meaning of a term of art, he cannot be asked to construe (*m*) a written document, for *Ad quæstionem legis respondent judices.*

OMNIA PRÆSUMUNTUR CONTRA SPOLIATOREM. (*Branch, Max., 5th ed., p.* 80.)—*Every presumption is made against a wrong-doer.*

Example of rule.

The following case will serve forcibly to illustrate the above maxim. An account of personal estate having been

(*i*) *The Sussex Peerage*, 11 Cl. & Fin. 85. See, also, *Di Sora* v. *Phillipps*, 10 H. L. Cas. 624; *per* Lord Langdale, M.R., in *Earl Nelson* v. *Lord Bridport*, 8 Beav. 527; *Baron de Bode* v. *Reg.*, 8 Q. B. 208, 246, 250, *et seq*; *The Perth Peerage*, 2 H. L. Cas. 865, 874. "A long course of practice sanctioned by professional men, is often the best expositor of the law;" *per* Lord Eldon, C., *Candler* v. *Candler*, 1 Jac. 232.

(*k*) *Vander Donckt* v. *Thellusson*, 8 C. B. 812. See *Reg.* v. *Povey*, 22 L. J., Q. B., 19; S. C., Dearsl., C. C. 32. In *Bristow* v. *Sequeville*, 5 Exch. 275, a witness was held inadmissible to prove the law of a foreign country, whose knowledge of it had been acquired solely by studying it at a university in another country. This decision was followed *in re* the goods of Bonelli, 1 P. D. 69; 45 L. J. P. 2.

(*l*) In the goods of Dost Aly Khan, 6 P. D. 6; 49 L. J. P. 78.

(*m*) *Kirkland* v. *Nisbet*, 3 Macq. Sc. App. Cas. 766.

sold without any express stipulation as to price, and the vendor prove the delivery of the goods, but give no evidence to fix their value, they are presumed to be worth the lowest price for which goods of that description usually sell; but, if the vendee himself be shown to have suppressed the means of ascertaining the truth, then a contrary presumption arises, and the goods are taken to be of the very best description (*r*).

According to the same principle, if a man withhold an agreement under which he is chargeable, after a notice to produce, it is presumed, as against him, to have been properly stamped, until the contrary appear (*s*). Where a public officer, such as a sheriff, produces an instrument, the execution of which he was bound to procure, as against him it is presumed to have been duly executed (*t*). Moreover, if a person is proved to have defaced or destroyed any written instrument, a presumption arises, that, if the truth had appeared, it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance, and, accordingly, slight evidence of the contents of the instrument will usually, in such a case be sufficient (*u*). A testator made a will, by which he devised certain premises to A., and afterwards made

Trial, 29 St. Tr. 1193–4). But "a person who refuses to allow his solicitor to violate the confidence of the professional relation" cannot be regarded in the same odious light as was the jeweller in the above case; *per* Lord Chelmsford, *Wentworth* v. *Lloyd*, 10 H. L. Cas. 591.

(*r*) *Clunnes* v. *Pezzey*, 1 Camp. 8; followed *Lawton* v. *Sweeney* (Exch.), 8 Jur. 964. See *Hayden* v. *Hayward*, 1 Camp. 180.

(*s*) *Crisp* v. *Anderson*, 1 Stark., N. P. C., 35.

(*t*) *Scott* v. *Waithman*, 3 Stark., N. P. C., 168; *Plumer* v. *Brisco*, 11 Q. B. 52; *Barnes* v. *Lucas*, 1 Ry. & M. 264.

(*u*) 1 Phil. Ev., 10th ed., 477, 478, where various cases are cited exemplifying the maxim in the text; *Annesley* v. *Earl of Anglesey*, 17 Howell, St. Tr. 1430; 1 Stark. Ev., 3rd ed., 409; *Roe* d. *Haldane* v. *Harvey*, 4 Burr. 2484; *Lord Trimlestown* v. *Kemmis*, 9 Cl. & F. 775.

means of showing the quantum of his interest, and that "the non-production of the lease raised a presumption that the production of it would do the plaintiff no good."

Rule in actions of ejectment.

On the principle of this maxim rests the well-known rule in actions of ejectment that the plaintiff must recover by the strength of his own title, not the weakness of his antagonist's, for no one can recover in ejectment who would not be entitled to enter without bringing ejectment; and any person entering on the possession of the tenant unless he have a better title is a wrong doer.

If the evidence alleged to be withheld is shown to be unattainable, the presumption *contra spoliatorem* ceases, and the inferior evidence is admissible. If therefore, a deed be in the possession of the adverse party, and not produced, or if it be lost and destroyed, no matter whether by the adverse party or not, secondary evidence is clearly admissible; and, if the deed be in the possession of a third person, who is not by law compellable to produce it, and he refuses to do so, the result is the same, for the object is then unattainable by the party offering the secondary evidence (*a*).

OMNIA PRÆSUMUNTUR RITE ET SOLENNITER ESSE ACTA. (*Co. Litt.* 6 *b.* 332.)—*All acts are presumed to have been rightly and regularly done.*

Rule stated.

Ex diuturnitate temporis omnia præsumuntur ritè et solenniter esse acta (*b*). "Antiquity of time fortifieth

(*a*) Judgm., *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 121; *Marston* v. *Downes*, 1 A. & E. 31; *Cooke* v. *Tanswell*, 8 Taunt. 450.

(*b*) Jenk. Cent. 185; *Roberts* v. *Bethell*, 12 C. B. 778, seems to offer an illustration of the presumption *omnia sollenniter esse acta*. See

all titles and supposeth the best beginning the law can give them" (*c*). And again, "it is a maxim of the law of England to give effect to every thing which appears to have been established for a considerable course of time, and to presume that what has been done was done of right, and not of wrong" (*d*). This maxim applies as well where matters are in contest between private persons as to matters public in their nature (*e*).

Rule applies to private rights.

For instance: A lease contained a covenant on the part of the lessee that he would not, without the consent of the lessor, use, exercise, or carry on in the demised premises, any trade or business whatsoever, nor convert the demised dwelling-houses into a shop, nor suffer the same to be used for any other purpose than dwelling-houses. One of the dwelling-houses was converted into a public-house and grocery shop, and the lessor, with full knowledge thereof, for more than twenty years received the rent. The plaintiff, having purchased from the lessor the reversion of the premises in question, brought an action of ejectment for breach of the covenant above specified.—Held, that user of the premises in their altered state for more than twenty years, with the knowledge of the lessor, was evidence from which a jury might presume a licence (*f*).

Potez v. *Glossop*, 3 Exch. 191; observed upon, *per* Lord Wensleydale, *Buller* v. *Mountgarret*, 7 H. L. Cas. 647; *Morgan* v. *Whitmore*, 6 Exch. 716.

(*c*) Hob. 257; *Ellis* v. *Mayor of Bridgnorth*, 15 C. B., N. S., 52.

(*d*) *Per* Pollock, C.B., 2 H. & N. 623; and in *Price* v. *Worwood*, 4 H. & N. 514, where the same learned judge observes, "The law will presume a state of things to continue which is lawful in every respect; but, if the continuance is unlawful, it cannot be presumed."

(*e*) See, *per* Pollock, C. B., *Reed* v. *Lamb*, 6 H. & N. 85–86; *per* Crompton, J., *Dawson* v. *Surveyor of Highways for Willoughby*, 5 B. & S. 924.

(*f*) *Gibson* v. *Doeg*, 2 H. & N. 615.

Where, indeed, a private right is in question, the presumption *omnia ritè esse acta*, may as already stated, under various and wholly dissimilar states of facts arise *ex diuturnitate temporis*.—Thus, the enrolment of a deed may be presumed; where there has been a conveyance by lease and release, the existence of the lease may be presumed on the production of the release; and livery of seisin, the surrender of a copyhold estate, or a reconveyance from the mortgagee to the mortgagor, may be presumed (*g*). Where an attestation clause to a deed stated that the deed had been signed, sealed and delivered, and certain commissioners before whom the deed had to be executed, certified that the parties had acknowledged the same to be their respective acts and deeds, the Court presumed the deed to have been properly sealed, although upon the face of it there was no indication of the impression of a seal (*h*). Upon the same principle proceeds the rule that deeds, wills, and other attested documents which are more than thirty years old, and are produced from an unsuspected repository prove themselves, and the testimony of the subscribing witness may be dispensed with, although of course it is competent to the opposite party to

(*g*) *Per* Watson, B., 2 H. & N. 777; and cases cited, *Doe* d. *Robertson* v. *Gardiner*, 12 C. B. 319. So a lease will be presumed, in the absence of evidence to the contrary, on production of the counterpart: *Hughes* v. *Clark*, 10 C. B. 905. In *Avery* v. *Bowden* (in error), 6 E. & B. 973; Pollock, C. B., observes, that "where the maxim of *Omnia ritè acta præsumuntur* applies, there indeed, if the event ought properly to have taken place on *Tuesday*, evidence that it did take place on *Tuesday* or *Wednesday* is strong evidence that it took place on the *Tuesday*."

(*h*) *Re J. Sandilands and others*, L. R. 6 C. P. 411; for a case where the *primâ facie* presumption was rebutted and the onus shifted see *Marine Insurance Co.* v. *Hardside*, L. R. 5 H. L. 624; 42 L. J. Ch. 173.

call him to disprove the regularity of the execution (*i*).

Rule applied to public and official acts.

Again, where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favour of their due execution. In these cases the ordinary rule is, *Omnia præsumuntur ritè et solenniter esse acta donec probetur in contrarium* (*k*)—everything is presumed to be rightly and duly performed until the contrary is shown (*l*). The following may be mentioned as general presumptions of law illustrating this maxim:—That a man, acting in a public capacity, was properly appointed and is duly authorized so to do (*m*); that in the absence of proof to the contrary, credit should be given to public officers who have acted, *primâ facie*

(*i*) Best on Presumptions, p. 81. The date which appears on the face of a document is *primâ facie* its true date, *Malpas* v. *Clements*, 19 L. J. Q. B. 435; *Laws* v. *Rund*, 3 C. B. N. S. 244.

(*k*) Co. Litt. 232; *Van Omeron* v. *Dowick*, 2 Camp. 44; *Doe* d. *Phillips* v. *Evans*, 1 Cr. & M. 461; *Powell* v. *Sonnett*, 3 Bing. 381, offers a good instance of the application of this maxim. Presumption as to signature, *Taylor* v. *Cook*, 8 Price, 653. The Court will not presume any fact so as to vitiate an order of removal: *per* Lord Denman, C.J., *R.* v. *Stockton*, 5 B. & Ad. 550. See *Reg.* v. *St. Paul, Covent Garden*, 7 Q. B. 232; *Reg.* v. *Justices of Warwickshire*, 6 Q. B. 750; *Reg.* v. *St. Mary Magdalen*, 2 E. & B. 809. As to an order of affiliation, see *Watson* v. *Little*, 5 H. & N. 472, 478. As to an award, see *per* Parke, B., 12 M. & W. 251; as to presuming an indenture of apprenticeship, *Reg.* v. *Inhabs. of Fordingbridge*, E. B. & E. 678; *Reg.* v. *Inhabs. of Broadhempton*, 1 E. & E. 154, 162, 163.

Quære whether the maxim applies to the performance of a *moral* duty, see *per* Willes, J., *Fitzgerald* v. *Dressler*, 7 C. B. N. S. 399.

(*l*) See *per* Story, J., delivering Judgment, *Bank of the United States* v. *Dandridge*, 12 Wheaton (U. S.), R. 69, 70 (where the above maxim is illustrated and explained); *Davies* v. *Pratt*, 17 C. B. 183.

(*m*) *Per* Lord Ellenborough, C.J., *R.* v. *Verelst*, 3 Camp. 432; *Monke* v. *Butler*, 1 Roll. R. 83; *M'Gahey* v. *Alston*, 2 M. & W. 206; *Faulkner* v. *Johnson*, 11 M. & W. 581; *Doe* d. *Hopley* v. *Young*, 8 Q. B. 63; *Reg.* v. *Essex*, Dearsl. & B. 369; *M'Mahon* v. *Lennard*, 6 H. L. Cas. 970. See the above maxim applied, *per* Erle, C.J., *Bremner* v. *Hull*, L. R. 1 C. P. 759.

within the limits of their authority, for having done so with honesty and discretion (*n*); that the records of a court of justice have been correctly made (*o*), according to the rule, *Res judicata pro veritate accipitur* (*p*); that judges and jurors do nothing causelessly and maliciously (*q*); that the decisions of a court of competent jurisdiction are well founded, and their judgments regular (*r*); and that facts, without proof of which the verdict could not have been found, were proved at the trial (*s*).

Besides the cases below cited (*t*), which strikingly illustrate the presumption of law under our notice, the following may be adduced:—

(*n*) Judgm., *Earl of Derby* v. *Bury Improvement Commissioners*, L. R. 4 Ex. 226.

(*o*) *Reed* v. *Jackson*, 1 East, 355.

(*p*) D. 50. 17. 207; Co. Litt. 103, a.; Judgm., *Magrath* v. *Hardy*, 4 Bing., N. C. 796; *per* Alderson, B., *Hopkins* v. *Francis*, 13 M. & W. 670; *Irwin* v. *Grey*, L. R. 2 H. L. 20; *Smith* v. *Sydney*, L. R. 5 Q. B. 203.

A family Bible is in the nature of a record, and being produced from the proper custody, is itself evidence of pedigrees entered in it; *Hubbard* v. *Lees*, L. R. 1 Ex. 255, 258.

(*q*) *Sutton* v. *Johnstone*, 1 T. R. 503. See *Lumley* v. *Gye*, 3 E. & B. 114.

(*r*) *Per* Bayley, J., *Lyttleton* v. *Cross*, 3 B. & C. 327; *Reg.* v. *Brenan*, 16 L. J., Q. B., 289. See *Lee* v. *Johnstone*, L. R. 1 Sc. App. Cas. 426; *Morris* v. *Ogden*, L. R. 4 C. P. 687, 699.

(*s*) *Per* Buller, J., *Spieres* v. *Parker*, 1 T. R. 145, 146. If the return to a mandamus be certain on the face of it, that is sufficient, and the Court cannot intend facts inconsistent with it, for the purpose of making it bad. *Per* Buller, J., *R.* v. *Lyme Regis*, 1 Dougl. 159. See *R.* v. *Nottingham Waterworks Co.*, 6 A. & E. 355.

(*t*) See, as to presuming an Act of Parliament in support of an ancient usage, Judgm., *Reg.* v. *Chapter of Exeter*, 12 A. & E. 532—the passing of a by-law by a corporation from usage, *Reg.* v. *Powell*, 3 E. & B. 377; in favour of acts of Commissioners having authority by statute, *Horton* v. *Westminster Improvement Commissioners*, 7 Exch. 780; *Reg.* v. *St. Michael's, Southampton*, 6 E. & B. 807; an order of Justices for stopping up a road, *Williams* v. *Eyton*, 2 H. & N. 771, 777; *S. C.*, 4 *Id.* 357. See, also, *Woodbridge Union* v. *Guardians of Colneis*, 13 Q. B. 269.

Other instances.—Presumption against fraud, &c.

It is a well-established rule that the law will presume in favour of honesty and against fraud (*u*); it will moreover strongly presume against the commission of a criminal act, *ex. gr.*, that a witness has perjured himself (*x*).

The law will also presume strongly in favour of the validity of a marriage, especially where a great length of time has elapsed since its celebration (*y*)—indeed the legal presumption as to marriage and legitimacy is only to be rebutted by "strong, distinct, satisfactory and conclusive" evidence (*z*), therefore where it was shown that the man and woman had gone through a form of marriage, and thereby indicated an intention to be married, it was held that those who claimed by virtue of the marriage were not bound to prove that all necessary ceremonies had been performed (*a*).

Where the claimant of an ancient barony, which has been long in abeyance, proves that his ancestor sat as a peer in Parliament, and no patent or charter of creation can be discovered, it is now the established rule to hold

(*u*) *Middleton* v. *Barned*, 4 Exch. 241; *per* Parke, B., *Id.* 243; and in *Shaw*, app., *Beck*, resp., 8 Exch. 400; *Doe* d. *Tatum* v. *Catomore*, 16 Q. B. 745, 747, with which compare *Doe* v. *Shallcross* v. *Palmer*, *Id.* 747. See *Trott* v. *Trott*, 29 L. J., P. M. & A., 156.

(*x*) *Per* Lord Brougham, *McGregor* v. *Topham*, 3 H. L. Cas. 147, 148; *per* Turner, L.J., 4 De G. M. & G. 153.

(*y*) *Piers* v. *Piers*, 2 H. L. Cas. 331; *Sichel* v. *Lambert*, 15 C. B. N. S. 781, 787, 788; *Harrison* v. *Mayor of Southampton*, 4 De Gex, M. & G. 137; as to when consent to a marriage presumed, *Re Birch*, 17 Beav. 358.

(*z*) *Per* Lord Brougham, 2 H. L. Cas. 373; citing, *per* Lord Lyndhurst, *Morris* v. *Davies*, 5 Cl. & F. 265. See *Lapsley* v. *Grierson*, 1 H. L. Cas. 498; *The Saye and Sele Peerage*, *Id.* 507; *per* Erle, J., *Walton* v. *Gavin*, 16 Q. B. 58; *Harrison* v. *Mayor of Southampton*, 4 De G. M. & G. 137, 153.

(*a*) *Sasty Velaider, &c.* v. *Sembecutty, &c.*, 6 App. Cas. 364. See, also, *R.* v. *Jones*, 11 Q. B. D. 118; 52 L. J. M. C. 96; *R.* v. *Cresswell*, 1 Q. B. D. 446; 45 L. J. M. C. 77.

that the barony was created by writ of summons and sitting, although the original writ of summons or enrolment of it is not produced (*b*). In *The Hastings Peerage*, it was proved that A. B. was summoned by special writ to Parliament in the 49th Hen. 3, but there was no proof that he ever sat, there being no rolls or journals of that period. A. B.'s son and heir, C. D., sat in the Parliament of 18 Edw. 1, but there was no proof that he was summoned to that Parliament, there being no writs of summons or enrolments of them extant from 49 Hen. 3 to 23 Edw. 1. It further appeared that C. D. was summoned to the Parliament of 23 Edw. 1, and to several subsequent Parliaments, but there was no proof that he sat in any of them. Held, that it might be well presumed that C. D. sat in the Parliament of the 18th of Edw. 1 in pursuance of a summons, on the principle that *Omnia præsumuntur legitime facta donec probetur in contrarium* (*c*).

As regards the acts of private individuals, the presumption, *omnia rité esse acta*, forcibly applies where they are of a formal character, as writings under seal (*d*). Likewise upon proof of title, everything which is collateral to the title will be intended, without proof; for, although

(*b*) *The Braye Peerage*, 6 Cl. & Fin. 757; *The Vaux Peerage*, 5 Cl. & Fin. 526.

(*c*) *The Hastings Peerage*, 8 Cl. & Fin. 144.

(*d*) See Arg. and Judgm., in *Ricard* v. *Williams*, 7 Wheaton (U. S.), R. 59; *Strother* v. *Lucas*, 12 Peters (U. S.), R. 452; S. P., 2 *Id.* 760; 2 Exch. 549; *D'Arcy* v. *Tamar, &c. R. C.*, 4 H. & C. 463, 467–8.

As to presumption that a foreign bill of exchange was duly stamped at the time of its indorsement to plaintiff, *Bradlaugh* v. *De Rin*, L. R. 3 C. P. 286.

As to presumption of evidence of probate, see *Doe* d. *Woodhouse* v. *Powell*, 8 Q. B. 576.

As to presumption that a will was duly executed, *Lloyd* v. *Roberts*, 12 Moo., P. C. C., 158, 165; *Trott* v. *Trott*, 29 L. J., P. M. & A., 156.

the law requires exactness in the derivation of a title, yet where that has been proved, all collateral circumstances will be presumed in favour of right (*e*); and, wherever the possession of a party is rightful, the general rule of presumption is applied to invest that possession with a legal title (*f*). No greater obligation, it has, indeed, been said (*g*), lies upon a court of justice than that of supporting long continued enjoyment by every legal means, and by every reasonable presumption; this "doctrine of presumption goes on the footing of validity, and upholds validity by supposing that everything was present which that validity required," *Omnia præsumuntur ritè fuisse acta* is the principle to be observed.

In reference also to a claim by the rector of a parish to certain fees, founded on prescription, it has been judicially observed that "the true principle of the law applicable to this question is that where a fee has been received for a great length of time, the right to which could have had a legal origin, it may and ought to be assumed that it was received as of right during the whole period of legal memory, that is, from the reign of Richard I. to the present time, unless the contrary is proved" (*h*).

On the same principle it is a general rule that, where a person is required to do an act, the not doing of which would make him guilty of a criminal neglect of duty, it shall be intended that he has duly performed it unless the contrary be shown—*stabit præsumptio donec probetur in contrarium* (*i*); negative evidence rebuts this

(*e*) 3 Stark. Ev., 3rd ed., 936; 2 Wms. Saund. 5th ed., 42, n. (7).

(*f*) *Per* Lord Ellenborough, C.J., 8 East, 263. See *Simpson*, app., *Wilkinson*, resp., 8 Scott, N. R. 814; *Doe* d. *Dand* v. *Thompson*, 7 Q. B. 897.

(*g*) *Per* Lord Westbury, *Lee* v. *Johnstone*, L. R. 1 Sc. App. Cas. 435.

(*h*) *Bryant* v. *Foot*, L. R. 3 Q. B. 505; *Lawrence* v. *Hitch*, *Id.* 521.

(*i*) Wing. Max. 712; Hob. R. 297;

presumption, that all has been duly performed (*k*). Thus, on an indictment for the non-repair of a road, the presumption, that an award, in relief of the defendants, was duly made according to the directions of an inclosure Act, may be rebutted by proof of repairs subsequently done to the road by the defendants; for, if the fact had been in accordance with such presumption, they ought not to have continued to repair (*l*).

Proceedings of inferior courts.

It is, however, important to observe, in addition to the above general remark, that, in inferior courts and proceedings by magistrates, the maxim, *Omnia præsumuntur rité esse acta*, does not apply *to give jurisdiction* (*m*).

Thus, the Lord Mayor's Court in London is an inferior Court. When therefore process had issued out of that Court against C. as a garnishee, and he declared in prohibition, a plea which set up the custom of foreign attachment but did not allege, and the fact did not warrant any such allegation, that the original debt or the debt alleged to be due from the garnishee to the defendant arose within the City, or that any one of the parties to the suit was a citizen or was resident within the city, was held insufficient to show the existence of jurisdiction (*n*).

Again, where the examination of a soldier, taken

per Sir W. Scott, 1 Dods. Adm. R. 266; *Davenport* v. *Mason*, 15 Tyng (U. S.), R., 2nd ed., 87. "It seems reasonable that presumption which is not founded on the basis of certainty, should yield to evidence which is the test of truth." *Id.*

(*k*) *Per* Lord Ellenborough, C.J., *R.* v. *Haslingfield*, 2 M. & S. 561; recognising *Williams* v. *East India Co.*, 3 East, 192.

(*l*) *R.* v. *Haslingfield*, 2 M. & S. 558; *Manning* v. *Eastern Counties R. C.*, 12 M. & W. 237; *Doe* d. *Nanney* v. *Gore*, 2 M. & W. 321; *Heysham* v. *Forster*, 5 Man. & Ry. 277.

(*m*) *Per* Holroyd, J., 7 B. & C. 790. See *Reg.* v. *Inhabs. of Gate Fulford*, Dearsl. & B. 74; Best on Presumptions, p. 81.

(*n*) *The Mayor, &c. of London* v. *Cox*, L. R. 2 H. L. 239.

before two magistrates, was tendered in evidence to prove his settlement, but it did not appear by the examination itself, or by other proof, that the soldier, at the time when he was examined, was quartered in the place where the justices had jurisdiction, it was held not to be admissible (*o*). So, in the case of an order by magistrates, their jurisdiction must appear on the face of such order; otherwise, it is a nullity, and not merely voidable (*p*). Where an examination before removing justices left it doubtful whether the examination had been taken by a single justice or by two, the Court stated that they would look at the document as lawyers, and would give it the benefit of the legal presumption in its favour; and it was observed, that the maxim, *Omnia præsumuntur ritè esse acta* applied in this case with particular effect, since the fault, if there really had been one, was an irregular assumption of power by a single justice, as well as a fraud of the two, in pretending that to have been done by two which was, in fact, done only by one (*q*).

In a case before the House of Lords some remarks were made in reference to this subject, which may be here advantageously inserted: — It cannot be doubted, that where an inferior court (a court of limited jurisdiction, either in point of place or of subject-matter) assumes to proceed, its judgment must set forth such facts as show that it has jurisdiction, and must show also in what respect it has jurisdiction. But it is another thing to contend that it must set forth all the facts or particulars

(*o*) *R.* v. *All Saints, Southampton*, 7 B. & C. 785.

(*p*) *Per* Bayley, J., 7 B. & C. 790; *R.* v. *Hulcott*, 6 T. R. 583; *R.* v. *Helling*, 1 Stra. 8; *R.* v. *Chilvers-coton*, 6 T. R. 178; *R.* v. *Holm*, 11 East, 381; *Reg.* v. *Totness*, 11 Q. B. 80.

(*q*) *Reg.* v. *Silkstone*, 2 Q. B. 520, and cases cited, *Id.* p. 729, n. (*p*).

out of which its jurisdiction arises. Thus, if a power of commitment or other power is given to justices of a county, their conviction or order must set forth that they are two such justices of such county, in order that it may be certainly known whether they constitute the tribunal upon which the statute they assume to act under has conferred the authority to make that order or pronounce that conviction. But, although it is necessary that the jurisdiction of the inferior court should appear, yet there is no particular form in which it should be made to appear. The Court above, which has to examine, and may control, the inferior court, must be enabled, somehow or other, to see that there is jurisdiction such as will support the proceeding; but in what way it shall so see it is not material, provided it does so see it (*r*). The rule, therefore, may be stated to be, that, where it appears upon the face of the proceedings that the inferior court has jurisdiction, it will be intended that the proceedings are regular (*s*); but that, unless it so appears, —that is, if it appear affirmatively that the inferior court has no jurisdiction, or, if it be left in doubt, whether it has jurisdiction or not, — no such intendment will be made (*t*). "The old rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of the

(*r*) *Per* Lord Brougham, *Taylor* v. *Clemson*, 11 Cl. & Fin. 610, affirming the judgment of the Exchequer Chamber in S. C., 2 Q. B. 978. In this case, and in *The Mayor, &c. of London* v. *Cox*, L. R. 2 H. L. 239, many authorities as to the necessity of showing jurisdiction are collected and reviewed.

(*s*) A presumption in favour of regularity in official practice is often made. See (*ex. gr.*) *Barnes* v. *Keane*, 15 Q. B. 75, 82; *Re Warne*, 15 C. B. 767, 769; *Baker* v. *Cave*, 1 H. & N. 674; *Cheney* v. *Courtois*, 13 C. B. N. S. 634; *Robinson* v. *Collingwood*, 17 C. B. N. S. 777.

(*t*) *Per* Tindal, C.J., *Dempster* v. *Purnell*, 4 Scott, N. R. 39 (citing *Moravia* v. *Sloper*, Willes, 30, and *Titley* v. *Foxhall*, *Id.* 688); *per* Erle, J., *Barnes* v. *Keane*, 15 Q. B. 84.

superior court but that which specially appears to be so; nothing is intended to be within the jurisdiction of an *inferior* court but that which is expressly alleged" (*u*). And again, "it is necessary for a party, who relies upon the decision of an inferior tribunal, to show that the proceedings were within the jurisdiction of the Court (*x*).

Foreign court of inferior jurisdiction.

Where the District Court of Philadelphia at the suit of the defendant issued a writ of attachment against a certain ship, the property of the plaintiff, for the purpose of enforcing a debt which the defendant alleged was owing to him by the plaintiff, and the plaintiff afterwards brought an action against the defendant in this country for trespass in seizing the ship, it was held that it must be presumed, in the absence of evidence to the contrary, that the Court had jurisdiction to issue the process in question (*y*).

Gosset v *Howard*

In the great case of *Gosset* v. *Howard* (*z*), the Court of Exchequer Chamber held, that the warrant of the Speaker of the House of Commons must be construed by the rules applied in determining as to the validity of the warrants and writs issuing from a *superior* court; and they remarked that, with respect to writs so issued, it must be presumed that they are duly issued, that they have issued in a case in which the Court has jurisdiction, unless the contrary appear on the face of them, and that they are valid of themselves, without any allegation other than that of their issue, and a protection to all officers

(*u*) Arg., *Peacock* v. *Bell*, 1 Wms. Saund. 73; adopted *Gosset* v. *Howard*, 10 Q. B. 453; and in *The Mayor, &c., of London* v. *Cox*, L. R. 2 H. L. 259. See, also, further in connection with the text, *Id.* 261, *et seq.*

(*x*) *Per* Alderson, B., *Stanton* v. *Styles*, 5 Exch. 583; *acc. The Mayor, &c., of London* v. *Cox*, L. R. 2 H. L. 239.

(*y*) *Taylor* v. *Ford*, 29 L. T. (N. S.) 392

(*z*) 10 Q. B. 411, where the cases with respect to the validity of warrants were cited in argument

and others in their aid acting under them. Many of the writs issued by superior courts do, indeed, upon the face of them, recite the cause of their issuing, and show their legality—writs of execution for instance. Others, however, do not, and, though unquestionably valid, are framed in a form which, if they had proceeded from magistrates or persons having a special jurisdiction unknown to the common law, would have been clearly insufficient, and would have rendered them altogether void. With respect to the Speaker's warrant, the Court held themselves bound to construe it with at least as much respect as would be shown to a writ out of any of the courts at Westminster; observing, in the language of Mr. Justice *Powys* (*a*), that "the House of Commons is a great Court, and all things done by them are intended to have been *ritè acta*" (*b*).

RES INTER ALIOS ACTA ALTERI NOCERE NON DEBET. (*Wing. Max., p.* 327.)—*A transaction between two parties ought not to operate to the disadvantage of a third* (*c*).

Principle rule.

Of maxims relating to the law of evidence, the above may certainly be considered as one of the most important and most practically useful; its effect is to prevent a litigant party from being concluded, or even affected, by the evidence, acts, conduct, or declarations of strangers (*d*).

(*a*) *Reg.* v. *Paty*, 2 Lord Raym. 1105, 1108.

(*b*) Judgm., *Gosset* v. *Howard*, 10 Q. B. 457.

(*c*) *Res inter alios judicata neque emolumentum afferre his qui judicio non interfuerunt neque prejudicium solent irrogare.*—Cod. 7. 56. 2.

(*d*) The maxim as to *res inter alios acta*, was much considered in *Meddowcroft* v. *Huguenin*, 3 Curt. R. 403 (where the issue of a marriage

On a principle of good faith and mutual convenience, a man's own acts are binding upon himself, and are, as well as his conduct and declarations, evidence against him; yet it would not only be highly inconvenient, but also manifestly unjust, that a man should be bound by the acts of mere unauthorized strangers; and if a party ought not to be bound by the acts of strangers, so neither ought their acts or conduct to be used as evidence against him (*e*).

The above rule, then, operates to exclude all the acts, declarations, or conduct of others as evidence to bind a party, either directly or by inference; so that, in general, no declaration, written entry, or affidavit made by a stranger is evidence against a man; nor can a person be affected, still less concluded, by any evidence (*f*), decree, or judgment to which he was not actually, or, in consideration of law, privy (*g*).

which had been pronounced null and void by the Consistorial Court, attempted unsuccessfully to impeach that sentence in the Prerogative Court). S. C., 4 Moore, P. C. C., 386. See *Reg.* v. *Fontaine Moreau*, 11 Q. B. 1028, and cases *infra*.

(*e*) 1 Stark. Evid. 3rd ed., 58, 59; Stephen, Dig. Law of Evid., 1st ed., 138. See *Armstrong* v. *Normandy*, 5 Exch. 409; *Reg.* v. *Ambergate, &c., R. C.*, 1 E. & B. 372, 381; *Salmon* v. *Webb*, 3 H. L. Cas. 510.

(*f*) See *Humphreys* v. *Pensam*, 1 My. & Cr. 580.

(*g*) "It cannot be doubted that a man's assertions or admissions, whether made in the course of a judicial proceeding or otherwise, and, in the former case, whether he was himself a party to such proceeding or not, may be given in evidence against him in any suit or action in which the fact so asserted or admitted becomes material to the issue to be determined. And in principle there can be no difference whether the assertion or admission be made by the party himself, who is and ought to be affected by it, or by some one employed, directed, or invited by him to make the particular statement on his behalf. In like manner a man who brings forward another for the purpose of asserting or proving some fact on his behalf, whether in a court of justice or elsewhere, must be taken himself to assert the fact which he thus seeks to establish:" *per* Cockburn, C.J., *Richards* v. *Morgan*, 4 B. & S. 661.

Maxim applied to judicial proceedings.

From an important case (*h*), immediately connected with this subject, the following remarks are extracted:—It is certainly true, as a general principle, that a transaction between two parties in judicial proceedings ought not to be binding upon a third party, for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment, which he might think erroneous; and, therefore, the depositions of witnesses in another cause (*i*) in proof of a fact, the verdict of a jury finding the fact, and the judgment of the Court upon facts found, although evidence against the parties and all claiming under them, are not, in general, to be used to the prejudice of strangers (*k*).

Judgments *in personam* and *in rem*.

As between the parties to the original suit, it will be merely necessary to observe, that the judgment of a court of concurrent jurisdiction directly upon the point is as a plea, a bar, or as evidence, conclusive, between *the same parties* upon the same matter directly in question in another court (*l*). But, where the judgment of a court of competent jurisdiction has been pronounced *in rem*, and has actually operated upon the *status* of a particular thing, it may happen that some other court, proceeding likewise *in rem*, may pronounce a contrary judgment on

(*h*) See the opinion of the judges in the *Duchess of Kingston's case*, 11 Howell, St. T. R., 261. See, also, *Needham* v. *Bremner*, L. R. 1 C. P. 583; *Natal Land, &c., Co.* v. *Good*, L. R. 2 P. C. 121; *Davies*, demand., *Lowndes*, ten., 7 Scott, N. R. 141; *Doe* d. *Bacon* v. *Brydges*, *Id.* 333; *Lord Trimlestown* v. *Kemmis*, 9 Cl. & Fin. 781, cited *Boileau* v. *Rutlin*, 2 Exch. 665, 677. The general rule stated in the text has, however, been departed from in certain cases; for instance, in questions relating to manorial rights, public rights of way, immemorial customs, disputed boundary, disputed modus, and pedigrees.

(*i*) See, for instance, *Morgan* v. *Nicholl*, L. R. 2 C. P. 117.

(*k*) See, also, Judgm., *King* v. *Norman*, 4 C. B. 898.

(*l*) *Ante*, p. 321 *et seq.*

the same subject-matter, in which case it must be looked upon as arrogating to itself and exercising the functions of a court of appeal, and it is only in this point of view that its decision can be considered as warrantable. It must be further observed, that in no case can a judgment be evidence of any matter which came collaterally in question, though within the jurisdiction of the Court, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment; and the above rule applies not only to the parties to the judgment, but likewise to the privies thereto (*m*).

As regards third persons, it is peculiarly necessary to notice the distinction between judgments strictly *inter partes* and those *in rem;* a judgment *inter partes* or *in personam* being, in general, conclusive between the original parties only and their privies (*n*); whereas a judgment *in rem* renders the thing adjudicated upon, *ipso facto,* such as it is thereby declared to be, and is, therefore, of effect as between all persons whatever (*o*). Thus, a grant of probate or of administration is in the nature of a decree *in rem,* and actually invests the executor or administrator with the character which it declares to belong to him; and such a grant of probate or administration is accordingly (if genuine, unrevoked, and granted by a Court of competent jurisdiction) con-

(*m*) *Duchess of Kingston's case, ubi supra,* and note thereto, 2 Smith, L. C. 8th ed., 832, 833; *Doe* d. *Lord Downe* v. *Thompson,* 9 Q. B. 1037.

(*n*) See, for instance, *Lady Wenman* v. *Mackenzie,* 5 E. & B. 447.

(*o*) But a verdict of guilty and judgment thereon on an indictment for obstructing a public highway cannot be pleaded as an estoppel in an action afterwards brought by the party convicted against a third person for using the way: *Petrie* v. *Nuttall,* 11 Exch. 569. For a definition of Judgment *in rem,* see L. R. 4 H. L. 427, *per* Blackburn, J.

clusive as against all the world (*p*). So, the sentence of a foreign Court of Admiralty, duly constituted and of competent jurisdiction, decreeing a ship to be lawful prize, is conclusive as to that which is in it, and as to the existence of the ground on which it professes to proceed, against all persons, until reversed by a regular court of appeal; all the world, it has been said, are parties to such a sentence (*q*). And, generally, where any statute or law, decree or judgment, is of a public nature, or operates *in rem*, the rule as to *res inter alios acta* does not apply, for to such proceedings all are privy (*r*).

It is likewise requisite to notice the distinction which exists between the case in which a verdict or judgment *inter partes* is offered in evidence, with a view to establish the mere fact that such a verdict was given, or such a judgment pronounced, and that in which it is offered as a means of proving some fact which is either expressly found by the verdict, or upon the supposed existence of which the judgment can alone be supported. In the latter case, as above stated, the evidence will not, in general, be admissible to conclude a third party; whereas, in the former, the judgment itself is invariably not only admissible as the proper legal evidence to prove the fact, but is usually conclusive evidence for that

(*p*) See, *per* Buller, J., *Allen* v. *Dundas*, 3 T. R. 129; *Prosser* v. *Wagner*, 1 C. B. N. S. 289.

(*q*) *Per* Lord Mansfield, C.J., *Bernardi* v. *Motteux*, Dougl. 581; *Hughes* v. *Cornelius*, 2 Show. 232; *per* Lord Ellenborough, C.J., *Bolton* v. *Gladstone*, 5 East, 160; 2 Park. Mar. Insur., 8th ed., 718; *Kindersley* v. *Chase*, cited *Id.* 743. As to the weight due to, and efficacy of a foreign judgment, see 2 Smith, L. C., 8th ed., 838 *et seq.*

(*r*) 1 Stark. Evid., 3rd ed., 61, 62; *Pim* v. *Curell*, 6 M. & W. 234.

See *Cammell* v. *Sewell*, 5 H. & N. 728; S. C., *Id.* 617, which was finally decided, however, by reference to the *lex loci contractûs*, and the opinion of the Judges, *per* Blackburn, J., in *Castrique* v. *Imrie*, L. R. 4 H. L. 414.

purpose, since it must be presumed that the court has made a faithful record of its own proceedings. Moreover, the mere fact that such a judgment was given can never be considered as *res inter alios acta*, being a thing done by public authority; neither can the legal consequences of such a judgment be ever so considered, for, when the law gives to a judgment a particular operation, that operation is properly shown and demonstrated by means of the judgment, which is no more *res inter alios* than the law which gives it force (*s*).

There is another qualification of the general rule as to *res inter alios* to be noticed.

Where acts have a direct legal operation, &c.

Where the acts or declarations of others have any legal operation material to the subject of inquiry, they must necessarily be admissible in evidence, and the legal consequence resulting from their admission, can no more be regarded as *res inter alios acta* than the law itself. For instance, where a question arises as to the right to a personal chattel, evidence is admissible even against an owner who proves that he never sold the chattel, of a subsequent sale of the chattel in market overt; for, although he was no party to the transaction, which took place entirely between others, yet, as such a sale has a legal operation on the question at issue, the fact is no more *res inter alios* than the law which gives effect to such a sale. So, in actions against the sheriff, it very frequently happens that the law depends wholly on transactions to which the sheriff is personally an entire stranger; as, where the question is as to the right of ownership in particular property seized under an execution; and in

(*s*) 1 Stark. Evid., 3rd ed., 252; *King* v. *Norman*, 4 C. B. 884; *Thomas* v. *Russell*, 9 Exch. 764; *Drouet* v. *Taylor*, 16 C. B. 671; *Boileau* v. *Rutlin*, 2 Exch, 665.

these cases all transactions and acts between others are admissible in evidence, which, in point of law, are material to decide the right of property (*t*).

In an action of assumpsit for making and fixing iron railings to certain houses belonging to the defendant, the defence was, that the credit was given to A., by whom they were built under a contract, and not to the defendant. A., who had become a bankrupt since the railing was furnished, was called as a witness for the defendant, and having stated that the order was given by him, he was asked what was the state of the account between himself and the defendant in reference to the building of the houses at the time of his bankruptcy. To this question A.'s reply was, that the defendant had overpaid him by £350. On the part of the plaintiff it was insisted that the state of the account between A. and the defendant was not admissible in evidence; that it was *res inter alios acta;* and that the inquiry was calculated improperly to influence the jury. It was held, however, by the Court in banc, that the evidence was properly received; and *Erle*, J., remarked, that in an action for goods sold and delivered, a common form of defence is, that the defendant is liable to pay another person, and that in such cases the jury usually come to the conclusion that the defendant in reality wants to keep the goods without paying for them; that the evidence in question went to show the *bona fides* of the defence by proving payment to such third person; and that it was not, therefore, open to the objection of being *res inter alios acta* (*u*).

Hearsay. The well-known rule excluding hearsay evidence may here claim attention, more especially as its operation is

(*t*) 1 Stark. Evid., 3rd ed., 61.

(*u*) *Gerish* v. *Chartier*, 1 C. B. 13, 17.

not unfrequently confounded with that of the maxim "*res inter alios.*" A leading authority (*x*) upon the law of evidence condemns the expression "hearsay evidence" as inaccurate and misleading, and the cause of general misconception as to the true nature of the rule. The same writer prefers the phrase "derivative or second-hand evidence." This is not receivable, the law requiring all evidence to be given under formal responsibility, *i.e.* upon the direct testimony of a witness in open court, subject to the penalties with which falsehood is attended. The rule therefore may be thus stated;—the fact that a statement was made, whether orally or in writing, by a person not called as a witness, is not admissible in evidence, except in certain excepted cases. Some of these excepted cases, which effect a most important qualification of the rule, must now be noticed.

Exceptions to rule—1st. Declarations against interest.

The declaration or entry of a deceased person who had peculiar means of knowing the matter stated and no object in misrepresenting it, is admissible, if relevant to the issue, where such declaration or entry was opposed to the proprietary (*y*) or pecuniary (*z*) interest of the declarant (*a*). In such a case, when a written statement or entry is relevant, it is only necessary to prove the handwriting and death of the party who made it (*b*).

Higham v. *Ridgway.*

In the leading case on this subject, it was held, that

(*x*) Best on Evidence, 7th ed., 445 *et seq.* See Stephen's Dig. Law of Ev., 1st ed., 22, 139.

(*y*) *R.* v. *Exeter*, L. R. 4 Q. B. 341; 38 L. J. M. C. 126; 20 L. T. 693; 17 W. R. 850.

(*z*) *The Sussex Peerage case*, 11 Cl. & F. 85; *R.* v. *Overseers of Birmingham*, 1 B. & S. 763.

(*a*) *Per* Bayley, B., *Gleadow* v. *Atkin*, 1 Cr. & M. 423, adverting to *Middleton* v. *Melton*, 10 B. & C. 317, *per eundem*; 1 Starkie, 3rd ed., 62; Steph. Dig. 35, 147; *Doe* d. *Sweetland* v. *Webber*, 1 A. & E. 740; *Plant* v. *Taylor*, 7 H. & N. 238.

(*b*) *Per* Parke, J., 3 B. & Ad. 889.

an entry made by a man-midwife, who had delivered a woman of a child, of his having done so on a certain day, referring to his ledger, in which he had made a charge for his attendance, which was marked as "paid," was evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery (*c*). Here, it will be remarked, the entry was admitted, because the party, by making it, discharged another, upon whom he would otherwise have had a claim. In another case, which was an action of trover by the assigness of a bankrupt, two entries made by an attorney's clerk in a day-book kept for the purpose of minuting his transactions, were held admissible, by the first of which the clerk acknowledged the receipt of £100 from his employer for the purpose of making a tender, and in the second of which he stated the fact of tender and refusal; for if an action had been brought by the official assignee of the bankrupt against the clerk for money had and received, the plaintiff could have proved by the first entry that the defendant had received the £100; and, by the second, he could have shown that the object for which the money was placed in the defendant's hands had not been attained. Consequently, the declaration might be con-

(*c*) *Higham* v. *Ridgway*, 10 East, 109 (distinguished in *Doe* d. *Kinglake* v. *Beviss*, 7 C. B. 456, 496, 509, 512; and in *Smith* v. *Blakey*, L. R. 2 Q. B. 326); *Bradley* v. *James*, 13 C. B. 822, 825; *Percival* v. *Nanson*, 7 Exch. 1; *Edie* v. *Kingsford*, 14 C. B. 759; *Doe* d. *Earl of Ashburnham* v. *Michael*, 17 Q. B. 276.

In *Higham* v. *Ridgway*, it should be observed, there was evidence to show that the work for which the charge was made was actually done. (See *Doe* d. *Gallop* v. *Vowles*, 1 M. & Rob. 261). Moreover, it will not be a valid objection to the admissibility of an entry, that it purports to charge the deceased, and afterwards to discharge him; for such an objection would go to the very root of this sort of evidence. (*Per* Lord Tenterden, C.J., *Rowe* v. *Brenton*, 3 Man. & Ry. 267.)

sidered as the entry of a fact within the knowledge of the deceased, which rendered him subject to a pecuniary demand (*d*). And, generally, it may be observed, that the rule as to *res inter alios acta* does not apply to exclude entries made by receivers, stewards, and other agents charging themselves with the receipt of money; such entries being admissible, after their decease, to prove the fact of their receipt of such money (*e*).

The foregoing are illustrations of the rule as to declarations against *pecuniary* interest. The following remarks relate rather to declarations against proprietary interest. An occupier *proved to be in possession* (*f*) of a piece of land is, *primâ facie*, presumed to be owner in fee, and his declaration is receivable in evidence, when it shows that he was only tenant for life or years (*g*). So, in an issue between A. and B., whether C. died possessed of certain property, her declaration, that she had assigned it to A. was held admissible (*h*). But it is clear, that a person who has parted with his interest in property cannot be allowed to divest the right of another claiming under him by any statement which he may choose to make (*i*), and, therefore, the declarations of a person who had conveyed away his interest in an estate by executing a settlement, and had subsequently mortgaged the same estate, were, after the death of the mortgagor, held inad-

(*d*) *Marks* v. *Lahèe*, 8 Bing. N. C., 408.

(*e*) *Per* Parke, J., *Middleton* v. *Melton*, 10 B. & C. 327.

(*f*) His possession must be proved. *La Touche* v. Hutton, 9 Ir. R, Eq. 166.

(*g*) Judgm., *Crease* v. *Barrett*, 1 C. M. & R. 931; *per* Mansfield, C.J., *Peaceable* v. *Watson*, 4 Taunt. 16; *Davies* v. *Pearce*, 2 T. R. 53; *Lord Trimlestown* v. *Kemmis*, 9 Cl. & Fin. 780. As to the extent to which a tenant for life may by his declaration affect a remainderman, see *Howe* v. *Malkin*, 40 L. T. 196; 27 W. R. 340.

(*h*) *Ivat* v. *Finch*, 1 Taunt. 141.

(*i*) *Per* Lord Denman, C.J., 1 A. & E. 740.

missible, on behalf of the mortgagee, to show that money had actually been advanced upon the mortgage (*k*).

2nd. Declaration made in course of business.

The declaration of entry of a deceased person if relevant to the issue is admissible where it was made by the declarant in the ordinary course of business, or in the discharge of professional duty, also near the time when the matter stated occurred and of his own knowledge (*l*).

Price v. *Earl of Torrington.*

The case (*l*) usually referred to as establishing the above rule, was an action brought by the plaintiff, who was a brewer, against the Earl of Torrington, for beer sold and delivered; and the evidence given to charge the defendant showed, that the usual way of the plaintiff's dealing was, that the draymen came every night to the clerk of the brewhouse, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen signed their names; and that the drayman was dead whose name appeared signed to an entry stating the delivery of the beer in question. This was held to be good evidence of a delivery.

In another important case on this subject, at the trial of an action of ejectment, it was proved to be the usual course of practice in an attorney's office for the clerks to serve notices to quit on tenants, and to indorse on duplicates of such notices the fact and time of service; that, on one occasion, the attorney himself prepared a notice to serve on a tenant, took it out with him, together with

(*k*) *Doe* d. *Sweetland* v. *Webber*, 1 A. & E. 733. As to declarations against interest, see, also, *The Sussex Peerage*, 11 Cl. & Fin. 85; *Smith* v. *Blakey*, L. R. 2 Q. B. 326; *per* Lord Denman, C.J., *Davis* v. *Lloyd*, 1 Car. & K. 276; *Taylor* v. *Witham*, 3 Ch. D. 605; 45 L. J. Ch. 798; 24 W. R. 877.

(*l*) Steph. Dig. 1st ed., 33, 146, and notes to *Price* v. *Earl of Torrington*, 1 Sm. L. C.; *Malcomson* v. *O'Dea*, 10 H. L. Cas. 605; *Smith* v. *Blakey*, L. R. 2 Q. B. 329, 333.

two others, prepared at the same time, and returned to his office in the evening, having indorsed on the duplicate of each notice a memorandum of his having delivered it to the tenant; and two of the notices were proved to have been delivered by him on that occasion. The indorsements so made were held admissible, after the attorney's death, to prove the service of the third notice (*m*).

It is necessary, however, that the particular entry be contemporaneous with the circumstance to which it relates; that it be made in the course of performing some duty (*n*), or discharging some office (*o*); and that it be respecting facts necessary to the performance of such duty; for, if the entry contain a statement of other circumstances, however naturally they may be thought to find a place in the narrative, it will not be legal proof of those circumstances (*p*).

Other exceptions.

Space will not permit of the other exceptions to the rule excluding hearsay evidence being here treated. The following extract from a judgment of Parke, B., well expresses the rule itself, and indicates many of the exceptions which qualify it.—One great principle in the law of evidence is, that all such facts as have not been admitted

(*m*) *Doe* d. *Patteshall* v. *Turford*, 3 B. & Ad. 890; cited *per* Sir J. Romilly, M.R., *Bright* v. *Legerton*, 29 L. J., Chanc., 852, 854; *Stapylton* v. *Clough*, 2 E. & B. 933; *Eastern Union R. C.* v. *Symonds*, 5 Exch. 237; *Doe* d. *Padwick* v. *Wittcomb*. 4 H. L. Cas. 425; S. C., 6 Exch. 601. See *Doe* d. *Padwick* v. *Skinner*, 3 Exch. 84; *Reg.* v. *St. Mary, Warwick*, 1 E. & B. 816, 820, 825; *Reg.* v. *Inhabs. of Worth*, 4 Q. B. 132. See, also, *Poole* v. *Dicas*, 1 Bing., N. C., 649.

(*n*) See *Massey* v. *Allan*, 13 Ch. D. 558.

(*o*) See *Polini* v. *Grey*, 12 Ch. D. 411; 49 L. J. Ch. 41; 40 L. T. 861; 28 W. R. 81.

(*p*) *Chambers* v. *Bernasconi* (in error), 1 C. M. & R. 347; *per* Blackburn, J., *Smith* v. *Blakey*, L. R. 2 Q. B. 332; *per* Parke, J., 3 B. & Ad. 897, 898; *per* Pollock, C. B., *Milne* v. *Leister*, 7 H. & N. 795; *Trotter* v. *Maclean*, 13 Ch. D. 574.

by the party against whom they are offered, or some one under whom he claims, ought to be proved under the sanction of an oath, (or its statutory equivalent,) either on the trial of the issue, or some other issue involving the same question, between the same parties, or those to whom they are privy. To this rule certain exceptions have been recognised some from very early times, on the ground of necessity or convenience; such as the proof of the quality and intention of acts by declarations accompanying them, of pedigrees and of public rights by the statement of deceased persons presumably well acquainted with the subject, as inhabitants of the district, in the one case, or relations, within certain limits, in the other; and another exception occurs, where proof of possession is allowed to be given by the entries of deceased stewards or receivers charging themselves, or proof of facts of a public nature by public documents (*q*).

Res gestæ.

There is one other topic, which may be adverted to as qualifying both the rule which excludes evidence of *res inter alios actæ*, and also that as to hearsay evidence. Under the head of *res gestæ*, an expression which, according to Sir James Stephen (*r*), seems to have come into use on account of its convenient obscurity, facts and statements are frequently admitted in evidence, which upon the broad construction of one or other of the rules which have been noticed would be inadmissible. The doctrine of *res gestæ* was much discussed in the leading case of *Doe* v. *Tatham* (*s*). In delivering his opinion to the

(*q*) *Per* Parke, B., 7 A. & E. 384, 385. For additional information as to the maxim respecting *res inter alios acta*, the reader is referred to 1 Tayl. Evid., 7th ed., 296 *et seq.*, 486 *et seq.*, and Steph. Dig.

(*r*) Dig. L. of Ev., 1st ed., p. 134.

(*s*) 7 A. & E. 313.

House of Lords in that case, Parke, B., said, "Where any facts are proper evidence upon an issue, all oral or written declarations which can explain such facts may be received in evidence" (*t*). Where declarations accompany an act, they are frequently admissible in evidence as part of the *res gestæ*, or as the best and most proximate evidence of the nature and quality of the act; their connection with which either sanctions them as direct evidence, or constitutes them indirect evidence from which the real motive of the actor may be duly estimated (*u*).

Aveson v. Lord Kinnaird.

Thus, an action was brought by a man on a policy of insurance on the life of his wife; and the question arose as to the admissibility of declarations made by the wife, when lying in bed, apparently ill, as to the bad state of her health, at the period of getting the regular surgical certificate, and down to that time. These declarations were made to the witness, who was produced at the trial to relate the wife's own account of the cause of her being found in bed by witness at an unseasonable hour, and with the appearance of being ill, and were held admissible, on the same ground, that inquiries of patients, by medical men, with the answers to them, are evidence of the state of health of the patient at the time; and it was further observed, that this was not only good evidence, but the best evidence which the nature of the case afforded (*x*).

So, where a bankrupt has done an equivocal act his declarations accompanying the act have been held admissible to explain his intentions; and, in order to render

(*t*) 4 Bing. N. C. 489.

(*u*) See *Ford* v. *Elliott*, 4 Exch. 78; *per* Pollock, C.B., *Milne* v. *Leister*, 7 H. & N. 796.

(*x*) *Aveson* v. *Lord Kinnaird*, 6 East, 188; 1 Phill. Ev., 10th ed., 149.

them so, it is not requisite that such declarations were made at the precise time of the act in question (*y*).

So, in cases of treason and conspiracy, it is an established rule, that, where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party in pursuance of the plan originally concerted, and with reference to the common object, is, in the contemplation of law, the act of the whole party (*z*), though, where a question arises as to the admissibility of documentary evidence, for the purpose of implicating a party, and showing his acquiescence in such illegal purpose and common object, it will always be necessary to consider, whether the rule *scribere est agere* applies, or whether the evidence in question is merely the narrative of some third party of a particular occurrence, and therefore, in its nature hearsay and original evidence.

NEMO TENETUR SEIPSUM ACCUSARE.—(*Wing. Max.* 486.)
No man can be compelled to criminate himself (*a*).

Policy of our law.

This maxim expresses a characteristic principle of English Law (*b*). Hence it is, that although an accused person may of his own accord make a voluntary statement as to the charge against him, a justice of the peace, before receiving his statement, is required by the 11 & 12

(*y*) *Bateman* v. *Bailey*, 5 T. R. 512. *Per* Tindal, C.J., *Ridley* v. *Gyde*, 9 Bing. 352; *Rawson* v. *Haigh*, 2 Bing. 99. See *Smith* v. *Cramer*, 1 Bing., N. C. 585.

(*z*) *Per* Bayley, J., *Watson's* case, 32 Howell, St. Tr. 7; *Reg.* v. *Blake*, 6 Q. B. 126.

(*a*) A man is *competent* to prove his own crime, though not *compellable*: *per* Alderson, B., *Udal* v. *Walton*, 14 M. & W. 256.

(*b*) As to the Scotch law on the above point, see *Longworth* v. *Yelverton*, L. R. 1 Sc. App. Cas. 218.

Vict. c. 42, s. 18, to administer to him the caution that he is not bound to say anything, and that what he does say may be used in evidence against him. It may be stated as a general rule that a witness in any proceeding is (*c*), privileged from answering not merely where his answer will criminate him directly, but where it may have a tendency to criminate him (*d*). "The proposition is clear," remarked Lord *Eldon* in *Ex parte Symes* (*e*), "that no man can be compelled to answer what has any tendency to criminate him,"—which proposition is, it seems, to be thus qualified, that the danger to be apprehended by the witness must be "real and appreciable with reference to the ordinary operation of law in the ordinary course of things, not a danger of an imaginary and unsubstantial character having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct," for such a possibility should not be suffered to obstruct the administration of justice (*f*). And, although a party to a cause, who has been subpœned as a witness, cannot object to be sworn on the ground that any relevant questions would tend to criminate him (*g*), he may when such objectionable questions are put claim his privilege (*h*),

(*c*) See cases cited *infra*.

(*d*) *Fisher* v. *Ronalds*, 12 C. B. 762; *per* Pollock, C.B., *Adams* v. *Lloyd*, 3 H. & N. 362; *R.* v. *Garbett*, 1 Den. C. C. 236. The cases supporting this proposition are collected in Rosc. Law of Evidence in Crim. Cas., 4th ed., pp. 162 *et seq.* See *Ex parte Fernandez*, 10 C. B. N. S. 3; *Re Fernandes*, 6 H. & N. 717; *Bradlaugh* v. *Evans*. 11 C. B. N. S. 377.

(*e*) 11 Ves. 525.

(*f*) *Reg.* v. *Boyes*, 1 B. & S. 311, 330. Approved *Re Reynolds*, 21 Ch. D. 701. See *Re Mexican and South American Co*, 28 L. J., Chanc., 631.

(*g*) *Boyle* v. *Wiseman*, 10 Exch. 647.

(*h*) The objection that interrogatories delivered under 17 & 18 Vict. c. 125, s. 51, tend to criminate the party sought to be interrogated must come from himself when sworn: *Os-*

The protection does not extend to excuse a person from answering questions on the ground that the answers may establish or tend to establish that he *owes a debt* or is otherwise *liable in any civil suit*, either at the instance of the Crown or of any other person (*i*), as to whether a person is bound to answer a question the answer to which may criminate his or her wife or husband, the authorities are somewhat conflicting, though they tend to establish the privilege in such cases (*k*).

Where, however, the reason for the privilege of the witness or party interrogated ceases, the privilege will cease also (*l*); as if the prosecution to which the witness might be exposed or his liability to a penalty or forfeiture is barred by lapse of time, or if the offence has been pardoned or the penalty or forfeiture waived (*m*).

born v. *London Dock Co.*, 10 Exch. 698, followed in *Chester* v. *Wortley*, 17 C. B. 410, 426; and in *Bartlett* v. *Lewis*, 12 C. B. N. S. 249; *Fisher* v. *Owen*, L. R. 8 Ch. 645; 47 L. J. Ch. 681, C. A.

As to interrogatories tending to criminate, see *Edmunds* v. *Greenwood*, L. R. 4 C. P. 70; *Villeboisnet* v. *Tobin*, *Id.* 184; *Allhusen* v. *Labouchere*, 3 Q. B. D. 654; *Atherley* v. *Harvey*, 2 Q. B. D. 524; *W. of England Bank* v. *Nicholls*, 6 Ch. D. 613.

As to compelling a person to produce documents, the production of which might subject him to penalties, see *Pritchett* v. *Smart*, 7 C. B. 625, citing *Bullock* v. *Richardson*, 11 Ves. 373. See *Webb* v. *East*, 5 Ex. D. 23; 49 L. J. Ex. 250; 41 L. T. 715; 28 W. R. 336. Where a doubt is expressed by the C. A. whether a party is protected from producing documents even though he swears they will tend to criminate him.

Whether or not a witness is compellable to answer questions having a tendency to *disgrace* him, is ably discussed by Mr. Best in his Principles of the Law of Evidence, 2nd ed., pp. 163 *et seq.*, to which the reader is referred. See 17 & 18 Vict. c. 125, s. 25.

(*i*) 46 Geo. 3, c. 37, which was enacted to put an end to the doubts which had been expressed.

(*k*) *R.* v. *Claviger*, 2 T. R. 263; *R.* v. *All Saints, Worcester*, 6 M. & G. 194, 200, *per* Bayley, J.; *Cartwright* v. *Green*, 8 Ves. 405; *R.* v. *Halliday*, Bell, 257.

(*l*) Wigr. on Discovery, 2nd ed. p. 83, where the equity cases upon the point *supra*, are collected.

(*m*) See *Ex parte Fernandez*, and *Reg.* v. *Boyes*, *ante*, p. 923 n. (*d*) and (*f*).

How rule is qualified.

The rule *Nemo tenetur seipsum accusare*, which has been designated (*n*) "a maxim of our law as settled, as important and as wise as almost any other in it," is, however, sometimes trenched upon, and the privilege which it confers, is in special cases abrogated. Thus a bankrupt under examination by the Court of Bankruptcy does not enjoy any such protection (*o*); but a witness summoned for examination as to the bankrupt's affairs may refuse to answer upon the ground that his answer might tend to criminate him (*p*). And the legislature will sometimes on grounds of policy, extend indemnity—partial or entire—to a witness whose privilege is taken away (*r*) or not insisted on; thus by the 24 & 25 Vict, c. 96 (The Larceny Act, 1861), it is enacted (s. 85), that nothing in any of the preceding ten sections of that Act contained which relate to frauds by agents, bankers, and factors, "shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanours in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously

(*n*) *Per* Coleridge, J., Dearsl. & B. 61.

(*o*) *Ex pte. Schofield*, 6 Ch. D. 230; s. 17 of Bankruptcy Act, 1883. *Reg.* v. *Scott*, Dearsl. & B. 47; *Reg.* v. *Cross*, *Id.* 68; *Reg.* v. *Skeen*, Bell C. C. 97; *Reg.* v. *Robinson*, L. R. 1 C. C. 80, 85, 87, 90.

(*p*) *Ex pte. Reynolds*, 21 Ch. D. 601; 52 L. J. Ch. 223; 47 L. T. 495; 31 W. R. 187. See s. 59 of The Corrupt Practices Act, 1882, and the examples in Tayl. on Evidence, § 1455.

(*r*) For instance, under the 15 & 16 Vict. c. 57 (an Act to provide for more effectual enquiry into the existence of corrupt practices at elections for members to serve in Parliament), ss. 9, 10, 11.

to his being charged with such offence have first disclosed such act on oath in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any Court upon the hearing of any matter in bankruptcy or insolvency" (*s*).

The disclosure of any such illegal act as above referred to, in order to be available as a protection, must have been made *bonâ fide*, and must not have been a mere voluntary statement, made for the express purpose of screening the person making it from the penal consequences of his act (*t*).

Answering affidavit.

Lastly, in *Reg.* v. *Gillyard* (*u*), the facts were as under:—a maltster, suspected of having violated the excise laws, obtained a conviction against his servant for the purpose, as was suspected and charged, of relieving himself from penalties in respect of the same transaction by force of the stat. 7 & 8 Geo. 4, c. 52, s. 46. In support of a rule *nisi* to quash the conviction thus had the affidavits stated circumstances, showing that the conviction in question had been collusively obtained, and no *affidavit was made in opposition to the rule.* On behalf of the maltster it was urged that he ought not (regard being had to the maxim now under consideration) to have been called upon to defend himself by affidavit on a charge which was virtually of a criminal nature (*x*). But the conviction nevertheless, was quashed as being "a fraud and

(*s*) See also s. 86 of the same st. s. 52.

(*t*) See *Reg.* v. *Strahan*, 7 Cox, C. C., 85; which was decided under the repealed statute 7 & 8 Geo. 4, c. 29,

(*u*) 12 Q. B. 527.

(*x*) Citing *Stephens* v. *Hill*, 10 M. & W. 28.

mockery, the result of conspiracy and subornation of perjury," *Coleridge*, J., remarking that, "where the Court observes such dishonest practices it will interfere, although judgment has been given," and that "no honest man ought to think it beneath him or a hardship upon him to answer upon affidavit a charge of dishonesty made upon affidavit against him. If a man, when such a serious accusation is preferred against him, will not deny it, he must not complain if the case is taken *pro confesso*."

Competency of witnesses.

Upon the cognate subject of the competency of witnesses a few remarks must suffice (*y*). At one time it was the most important topic of the Law of Evidence, and was much discussed in the older text-books. Until the present reign, interest in a suit was considered to disqualify a person from giving testimony, the result being that, in most cases, the best evidence available was excluded. At Common Law the parties, and their husbands and wives, were incompetent as witnesses in all cases. This incompetency was removed as to the parties in civil cases by 14 & 15 Vict. c. 99, s. 2, and as to their husbands and wives by 16 & 17 Vict. c. 83, ss. 1 and 2. By both these Acts the Common Law was expressly reserved in criminal cases, and by the latter the incompetency of the parties, and their husbands and wives, was retained in proceedings instituted upon the ground of adultery. Now, by the 32 & 33 Vict. c. 68, s. 3, the incompetency in such proceedings is removed, but it is provided that no witness shall be asked any question, the answer to which may tend to show that he or she has committed adultery, unless such witness has already

(*y*) See Best, Bk. 1, Pt. 1, Ch. 2, where a complete history of the subject will be found.

given evidence in the same proceeding in disproof of the alleged adultery.

In criminal cases (*z*), the rule is still in accordance with the principle, *nemo tenetur seipsum accusare.* The accused person, his or her wife or husband (*a*), and every person, and the wife or husband of every person jointly indicted with him (*b*), is incompetent to give evidence. To this rule there are exceptions. In any criminal proceeding against a husband or wife for any bodily injury inflicted upon his or her wife or husband, such wife or husband is competent and compellable to testify (*c*). Another exception arises from the Married Women's Property Act, 1882 (*d*). By sect. 12, it is enacted that, in any proceeding under that section (*e*), a husband or wife shall be competent to give evidence against each other. At the present time a still more important modification is in contemplation, for by the Criminal Code Bill, introduced by the Government in the House of Commons in 1879, it is proposed that "any one accused of any indictable offence (and the husband or wife of such person) shall be a competent witness for *himself or herself*," and may be cross-examined if he tenders his

(*z*) As to what are criminal proceedings, as distinguished from civil, see *R.* v. *Russell*, 3 E. & B. 942; *Cattell* v. *Ireson*, E. B. & E. 91; *Parker* v. *Green*, 2 B. & S. 299; *Bishop of Norwich* v. *Pearce*, L. R. 2 A. & E. 281. The doubt entertained in *A.-G.* v. *Rudloff*, 10 Ex. 84, is settled by 28 & 29 Vict. c. 104, s: 34, as to proceedings upon the revenue side of the Court of Exchequer.

(*a*) *R.* v. *Thompson*, L. R. 1 C. C. R 377; 41 L. J. M. C. 112; *supra.*

(*b*) *R.* v. *Thompson*; *R.* v. *Payne*, L. R. 1 C. C. R. 349; 41 L. J. M. C. 65; but see *R.* v. *Deeley*, 11 Cox, C. C. 607; 23 L. T. 168.

(*c*) *Reeve* v. *Wood*, 5 B. & S. 364. As to Treason, see *Taylor*, s. 1237.

(*d*) 45 & 46 Vict. c. 75.

(*e*) The draughtman's blunder exposed by the case of *R.* v. *Brittleton*, 12 Q. B. D. 266, has been corrected by an Act of the present session.

evidence (*f*). But a provision is added, that no such person shall be liable to be called by the prosecutor, thus recognizing the principle, *nemo tenetur seipsum accusare.*

HAVING thus briefly touched upon some few rules relating chiefly to the admissibility of evidence, and having considerably exceeded the limits originally prescribed to myself, I now feel compelled reluctantly to take leave of the reader, trusting that, however slight or disproportioned this attempt to illustrate our legal maxims may appear, when compared with the extent and importance of the subject, I have yet, in the language of Lord Bacon, applied myself, not to that which might seem most for the ostentation of mine own wit or knowledge, but to that which might yield most use and profit to the student; and have afforded some materials for acquiring an insight into those conclusions of reason—those *legum leges*—essential to the true understanding and proper application of the law—whereof, though some may strongly savour of human refinement and ingenuity, the greater portion claim from us instinctively, as it were, recognition —and why? they have been 'written with the finger of Almighty God upon the heart of man' (*g*).

(*f*) Cl. 100, and note, s. 4 (2) of the Explosive Substances Act, 1883, 46 Vict. c. 3, by which a person accused of an offence under the Act, or his or her wife or husband, may, if such person thinks fit, be examined as a witness.

(*g*) See *Calvin's case*, 7 Rep. 126.

INDEX.

ACCESSIO,
title by, in Roman law, 457, *ib.* n. (*y*)

ACCESSORIUM SEQUITUR PRINCIPALE. *See* COMMON, FREIGHT, INTEREST.
instances of this rule, 457.

ACCORD AND SATISFACTION,
plea of, 835

ACT OF GOD,
definition of, 224.
damage to sea-walls arising from, 225.
contract, performance of when excused, 229, *et seq.*
payment of rent not excused by, 228.
bond, condition of, impossible by, 231, 232.
devise, condition in, prevented by, 233.
carrier not liable for, 233.
rule, where inapplicable, 236.

ACTA EXTERIORA INDICANT, &c., 293. *See* TRESPASS.

ACTIO PERSONALIS MORITUR CUM PERSONÂ, 855. *See* EXECUTOR, TRESPASS, MASTER AND SERVANT.

ACTION AT LAW. *See* CASE, CONTRACT, DEBT, LIMITATION, TRESPASS, TROVER, VENUE.
none against the Sovereign, 48, *et seq.*
right of, merges in felony, 155, 203—206.
consolidation of actions, 329

ACTUS CURIÆ NEMINEM GRAVABIT, 116.
judgment *nunc pro tunc*, 117.
limitation to rule, 119.

ACTUS DEI NEMINI FACIT INJURIAM, 224.

ACTUS LEGIS NEMINI EST DAMNOSUS, 120.

ACTUS NON FACIT REUM, &c., 300. *See* CRIMINAL INTENTION, CRIMINAL LAW, LIBEL, DRUNKENNESS.

AD EA QUÆ FREQUENTIUS, &c., 35. *See* STATUTES.

AD PROXIMUM ANTECEDENS FIAT RELATIO, &c., 636. *See* WILLS.

AD QUÆSTIONEM FACTI &c., 96. *See* JUDGE, JURY.

ADMINISTRATOR. *See* PERSONAL REPRESENTATIVES.
relation of title of, 861, 862.

ADVOWSON. *See* QUARE IMPEDIT.
appendant to a manor, 459.

AFFIDAVIT,
court will look solely at facts deposed to therein, 156.
to be sufficiently intituled, 630, 631.

AGENT. *See* PRINCIPAL AND AGENT.

AIDER BY VERDICT, 174, *et seq.*

ALIEN. *See* ALLEGIANCE.

ALIENATIO REI PRÆFERTUR, &c. *See* ALIENATION.

ALIENATION,
how defined, 414.
feudal system was opposed to, 415.
distinguished from subinfeudation, *ib.*
operation of statute *Quia Emptores*, 416.
De Prerogativâ Regis, *ib.*
De Donis, 417.
favoured by the courts, 418, 419.
by will, 419.
right of at common law, 420.
creation of perpetuities by will restrained, 423.
trusts for accumulation, 424.
by feme covert may be restrained, 425.
of personalty favoured, 427, 429.
under Settled Estates Act, 1882, 430.

ALLEGANS CONTRARIA, &c. *See* ESTOPPEL, GRANT, ELECTION.
rule as to, 161, 287, 288.
party bound by misrepresentation, 281, *et seq.*
fictitious payee of bill, 288.

ALLEGIANCE
defined, 71.
released from by act of Legislature, 73.
of aliens, 74.
Naturalization Act, 74.

ALLUVION,
where it belongs to the owner of the land, 157.

AMBIGUITAS LATENS, NON PATENS, &c., 561. *See* AMBIGUITY, WILL, DEED, EVIDENCE.

AMBIGUITY.
definition of latent and patent, 561.
rule as to patent, *ib.*
qualification of rule as to, 566.
latent, rule as to, 566.
admissibility of extrinsic evidence respecting, 570.
rule of construction in absence of, 573.

ANCESTOR. *See* HEIR.

APPORTIONMENT
of rent, in what case, 227, 277.

APPROPRIATION. *See* PAYMENT.

ARGUMENTUM AB INCONVENIENTI, &c., 177, *See* DOCUMENTS, STATUTES.

ARREST
under process, when unlawful, 122.

ASSAULT. *See* TRESPASS.

ASSIGNATUS UTITUR JURE AUCTORIS, 434. *See* ASSIGNEE, LANDLORD AND TENANT, PAWNEE.

ASSIGNEE,
who is an assignee, 434.
what amount of interest is assignable, 436—439.

ASSIGNEE (*continued*).
of chose in action, his rights, 441.
of bill of lading, 439.
liability of, 441.
may sue in his own name, 441.

ASSIZES, ONE LEGAL DAY, 128. *See* FICTION.
exception, *ib.*

ATTAINDER. *See* HEIR.
corruption of blood not pleadable in proceedings to set aside, 159.

ATTORNEY,
action against, for negligence, 193, 707.
for trespass, 829.
no privity between a town agent and the client of a country solicitor, 707.

AUDI ALTERAM PARTEM.
rule and examples, 106—109.

AUTREFOIS ACQUIT,
plea of, 330, 331.

AUTREFOIS CONVICT,
plea of, 330, 331.

AWARD,
how set aside, 87.
affects merger of original claim, 326.
when sufficiently certain, 580.
surplusage in, 582.

AWAY-GOING CROP,
who is entitled to, 387—390.
right of possession in respect of, 488.
custom for tenant to have, 874.

BAILIFF. *See* SHERIFF.

BANK NOTE,
alteration of, 149.
stolen, not recoverable from bonâ fide holder, 768.

BANKRUPT,
declarations by, when evidence, 921.
is bound to answer, though he may criminate himself, 925.

BARONY,
proof of ancient, 901, 902.

BASTARD
cannot inherit lands, 483, 484.
may take under a devise to children when, 519.

BENIGNÆ FACIENDÆ SUNT, &c., 498. *See* CONTRACT, DEED, WILL, STATUTES.

BILL OF EXCHANGE. *See* ASSIGNEE, DEBT, NEGOTIABLE INSTRUMENT, NUDUM PACTUM.
effect of alteration of, 148, 149.
fictitious payee, 288.
notice of dishonour, not specific, 151.
waiver of, 657.
the holder of bill indorsed in blank may sue, 443.
whether consideration requisite, 709.
laches in respect of, does not affect Crown, 63.
rights of holder of, 671, 672.
stolen, 768.
effect of payment by, 776.
mistake in, not to be explained by parol evidence, 564, 565.
discharged by waiver, 837.

BILL OF LADING,
transfer of, by indorsee, 439, 440.
authority of master of ship as to, 792.
maxim of *causa proxima*, how applied, 216.

BILLS OF SALE,
priorities amongst holders of, 341.

BLANK,
in a will not supplied by parol evidence, 562.

BOND,
effect of alteration of, 148.
action on, by commissioners of taxes, 156.
act of God making condition impossible, 231.
Act of Parliament making condition impossible, 238.

BOND (*continued*).
effect of the condition becoming otherwise impossible, 241, 242,
executed under assumed name, 280.
illegality a good defence to action on, 687, 688.
how discharged, 834, 836, 843.

BONI JUDICIS EST AMPLIARE JURISDICTIONEM. 75. *See* JUDGE.

BOROUGH ENGLISH, 338.

BOTTOMRY BONDS, exception to *Qui prior est*, &c. 240.

BOUGHT AND SOLD NOTE,
effect of alteration of, 149.

BROKER. *See* LIEN.

BYE-LAW
restraining navigation of canal, 20.
power of corporation to make, 450.

CARRIER. *See* CASE, PRINCIPAL AND AGENT.
for what damage he is liable, 219, 233.
how bound by his notices, 553.
railway company regarded as, 780.

CASE. *See* INJURY, LIMITATION, NEGLIGENCE.
origin of the action, 183.
novelty of complaint in, no objection, 183.
against returning officer, by voter, 184.
for invasion of a right, 192.
where it lies indifferently with assumpsit, 193.
by reversioner, 372.

CAVEAT EMPTOR, 723. *See* CONTRACT, SALE OF LAND, SALE OF GOODS, FRAUD, MISREPRESENTATION.

CERTAINTY,
what degree of, is sufficient, 578.
in a lease, *ib.*
an agreement, 574.
as to date in agreement for lease, 279.
in an award, 580.
in sale of goods, 580.

CERTUM EST QUOD CERTUM REDDI POTEST, 578. *See* CERTAINTY, INTEREST.

CESSANTE RATIONE LEGIS, &c., 153. *See* LAW.

CHALLENGE,
peremptory, allowed the prisoner in all felonies, 315.

CHARTER-PARTY,
when vitiated by alteration, 150.
how construed by reference to the intention of the parties, 508.
freight, pro rata itineris, how recovered, 609, 610
liability of parties to, 800.

CHEQUE,
action against banker, for refusing payment of, 192.
is assignable, 443.
within what time to be presented, 850.

CHOSE IN ACTION,
assignment of, 441.
assignee, when he may sue, 442.
as a rule subject to equities, 664.

CIRCUITY
is to be avoided, 329.

CLAUSULA DEROGATORIA,
what, 21.

COHABITATION.
grant of annuity after, 433.

COLONIAL LEGISLATIVE ASSEMBLY
power of, to punish for contempt, 454, 455.

COMITY OF NATIONS, 16.

COMMISSIONERS OF PAVING,
liability of, 5.

COMMISSIONERS OF TAXES,
action by, on bond, against tax-collector's surety, 57.

COMMON,
action for damage to, 140—142.
pur cause de vicinage, 154.
right to abate nuisance on, 412.
of pasture appendant, 460.

COMMUNIS ERROR FACIT JUS, 134.
meaning of maxim, 134.
limitations, 135—137.
its object is to protect vested interests, 137.

COMPULSION. *See* NECESSITAS.

CONDITION,
rendered impossible by act of God, 231, 232.
by act of obligor, 241.
by act of stranger, 242.
impossible at its creation, 241.
rendered impossible by act of obligee, 241.

CONFLICT OF LAWS, 15, 16.
divine and human, 15, 16.
foreign municipal, 16.

CONFUSION OF GOODS, 278.

CONSENSUS FACIT MATRIMONIUM, &c., 468. *See* MARRIAGE.

CONSENSUS TOLLIT ERROREM, 131. *See* WAIVER.

CONSIDERATION. *See* CONTRACT, NUDUM PACTUM.
in Roman and French Law, 699.
definition of, in English law, *ib.*, 702.
impossible, 242.

CONSTABLE. *See* JUDICIAL AUTHORITY.
when he may justify under warrant, 90.
require assistance of bystanders, 453.

CONTEMPORANEA EXPOSITIO EST, &c., 638. *See* GRANTS, STATUTES, PRECEDENTS.

CONTEMPT,
power of colonial legislative assembly to punish for, 454.

CONTINGENT INTEREST.
how distinguished from vested estate, 626.

CONTRACT. *See* CAVEAT EMPTOR, LIMITATION, NUDUM PACTUM, PRINCIPAL AND AGENT, CARRIER.
made on Sunday, when void, 17, 18.
tort, how distinguished from, 194.
act of God excuses performance of, 229 *et seq.*
impossibility of performance, when an excuse, 240.
improbability of performance no excuse, 243.
rescission, when justified, 244.
exception to this rule, 244, 245.
by infant for necessaries, 493.
father whether liable on son's contract for necessaries, 494.
written agreements, how construed, 507, 508.
fortius contra proferentem, 551.
rule of Roman law as to, 554.
exceptions, 556.
ambiguity, latent and patent, 572.
expressum facit cessare tacitum, 612, 613.
parol evidence, where inadmissible, 619.
examples—contract of sale, 613.
sale of goods, 615.
warranty, 615.
implied by law, 616.
sale of specific chattel, 617.
evidence of custom, where admissible, 618, 621.
evidence inadmissible to vary, 619.
qui hæret in litteræ, when applied to, 643.
modus et conventio vincunt legem, 645.
of married woman when void, 652.
rights of third parties not affected by, 653.
incidental advantages may be renounced by the party entitled to benefit, 655.
modus et conventio will not cure illegality, 650, 651.
effect of adopting an unauthorised, 823.
fraud, 282, 283, 287. *See* FRAUD.
a party shall not take advantage of his own fraud, 282, 283.
par delictum, 673. *See* PAR DELICTUM.
immoral or illegal, 686—690.
to oust court of jurisdiction, 691.

CONTRACT (*continued*).
when divisible, 695.
reason of rule as to ratification of, 826.
discharge and variation, 834—843.
special, 834—836.
simple, 836—839.
contracts within Statute of Frauds, 840.
may be explained by usage, 879.
actions on by personal representatives, 856, *et seq.*
against personal representatives, 858, 859.

CONTRIBUTION,
amongst tortfeasors, none, 682.

CONVEYANCE. *See* DEED.
act of God making a condition annexed impossible, 233.
condition being otherwise impossible, 242.

COPYHOLD,
relation of title to, 127, 128.

COPYRIGHT,
what it is, 345, 346.
depends on priority of composition and publication, 346.

CORPORATION,
power of, to make bye-laws, 450.
liability of, for works under statute, 818.

COURT. *See* JUDGE.
agreement to oust jurisdiction of, 691.

COVENANT. *See* DEED, LANDLORD AND TENANT, PERSONAL REPRESENTATIVE, SPECIALTY.
breach of, occasioned by statute, 239, 240.
running with land, 442, 661.

CRIMINAL CONVERSATION,
effect of husband's connivance on the maintenance of action for, 262, 263.

CRIMINAL INTENTION,
intention, when material, 300—304.
bare intention not punishable, 305.
in misdemeanors, 306.
persons of immature years, 308.

CRIMINAL INTENTION (*continued*).
libel and slander, 310—315.
murder, 305.
presumption *in favorem vitæ*, 315.

CRIMINAL LAW. *See* INDICTMENT, JUDGMENT.
foundation of, 8, 9.
should never be retrospective, 35.
whether ignorance excuses infringement of the law, 261.
plea of *autrefois acquit*, 330, 331.
actus non facit reum nisi mens sit rea, 300.
attempt distinguished from intention, 306, 307.
law relating to malice, 309.
consideration *in favorem vitæ*, 315.
doctrine of *res judicata* applies, 330—332.
master and servant, 820, n. (*k*).
principal and agent, 830.

CROWN. *See* ALLEGIANCE, ALIENATION, EXECUTION, EXTENT, FRANCHISE, JUDGMENT, KING, LIMITATION, MASTER AND SERVANT, PETITION OF RIGHT, PARDON, STATUTES.
maxims relating to, 40—74.
attributes of, 40.
descent of, 44.
conflicting rights of Crown and subject, 65—67.
demise of, 43.
irresponsibility of, 46.
grant from, when void, 47—51.
remedy against, 51—59.
not responsible for laches of its servants, 51—55.
when bound by statutes, 68—71.
Fortius accipiuntur applied in favour of, not against, 560.
servant of, not liable on contract, when, 819.
ratification by, of agent's act, 831.

CUICUNQUE ALIQUIS QUID CONCEDIT, &c., 445. *See* MINERALS, GRANT, STATUTE.

CUJUS EST DARE EJUS EST DISPONERE, 430. *See* LANDLORD AND TENANT, EASEMENT.

CUJUS EST SOLUM, &c., 371. *See* LAND, MINERALS, TRESPASS.

CURSUS CURIÆ EST LEX CURIÆ, 129. *See* PRACTICE.

CUSTOM,
distinguished from usage of trade, 881.
affecting mercantile contracts, 879.
knowledge of, when material, 882.
reasonableness of, 152.
respecting away-going crop, 387, *et seq.*
definition of, 871.
requisites to the validity of, 872—878.

CY-PRÈS,
the doctrine of, 521.

DAMAGES,
when too remote, 199.
in actions of contract, 200—220.
of tort, 201.
special, what are, 221.
when recoverable, 220.

DEBT. *See* CONTRACT, LIMITATION OF ACTIONS, PENALTY, MARRIAGE.

DECISIONS. *See* PRECEDENTS.

DE DONIS,
statute of, 417.

DEED,
requisites to the validity of, 97.
effect of alteration of, 148.
general principles for construction of, 499.
1. must give effect to every part, *ib.*
2. must be reasonable, *ib.*
3. must be favourable, *ib.*
deeds shall be made operative, 501.
examples, 501, 502.
words of doubtful import in, 503.
agreement for lease, 503.
construction of covenants, 504.
joint and several, 505.
dependent and independent, *ib.*
generally, 507, 508.
ex antecedentibus et consequentibus, 533.

DEED (*continued*).
general principles for construction of (*continued*).
examples—bond with condition, 534.
recitals, *ib.*
covenants, 535.
transposition of words, 536.
rejection of words, 537.
maxim, *noscitur a sociis* applied to, 542.
fortius contra proferentem, 549.
application to deed-poll, *ib.*
grant, *ib.*
leaseholds passed by general words in, 550.
exceptions, 556.
ambiguity, 561.
patent, not to be helped by averment, *ib.*
qualification of rule, 566.
latent, may be removed by averment, *ib.*
remarks on parol evidence, 570.
rule where no ambiguity exists, 573—575.
words deleted cannot be considered, 575.
certainty in, how ascertained, 579.
rejection of surplusage in, 582.
falsa demonstratio non nocet, 595.
verba generalia, how restrained, 602, 603.
construction of, 603.
recital controlling general words in, 603.
expressum facit cessare tacitum, 606.
applied to control implied covenants, 607.
examples—mortgage deed, 609.
charter-party, 610.
clausula inutilis, 628.
words incorporated by reference, *ib.*
schedule, 629.
relative words, how referred, 636.
exceptions and provisoes in, 632, 633.
context, how used, 533.
literal construction, where departed from, 642.
false grammar, 642.
explained — by contemporaneous acts of the parties, 638.
rendered invalid by fraud, 687.
usage may explain, 883

DE FIDE ET OFFICIO JUDICIS, 80. *See* JUDGE.

DELIVERY ORDERS,
title acquired by, 341.

DE MINIMIS NON CURAT LEX, 138.
rule stated and considered, 138.
meaning of maxim, 138.
in application for new trial, *ib.*
trespass to realty, inapplicable, 140.
misdemeanour, 141.

DE NON APPARENTIBUS, &c., 156.

DESCENT. *See* HEIR.

DESCRIPTION. *See* FALSA DEMONSTRATIO.
præsentia corporis tollit errorem nominis, 592.
juryman sworn under wrong name, 593.

DOCUMENTS, MERCANTILE.
inconvenience when an argument in construction of, 178.

DOLUS,
what, 222, n. (*d*).
circuitu non purgatur, 222.

DOMUS TUTISSIMUM REFUGIUM, 404. *See* SKYMAYNE'S CASE, SHERIFF, LANDLORD AND TENANT, TRESPASS.
protection limited to house alone, 410.
to occupier, 411, 412.

DRUNKENNESS,
when an excuse for crime, 304, 305.

EASEMENT. *See* LAND, WATER, LIGHT.
how protected by 2 & 3 Will. 4, c. 71, 364.
right to create, how limited, 432.

ELECTION,
doctrine of, 167.

EMBLEMENTS. *See* LANDLORD AND TENANT, TENANT FOR LIFE.

ERROR,
on attainder, 159.

ESTOPPEL. *See* LEASE.
account stated operating as, 161—2.
general account of, 162, *et seq.*
injuria not necessarily an element in, 163.
illustrations proving this, 163—4.
in pais, definition of, 283—6.
limitation of doctrine, 286.

ESTOVERS,
right to, 700.

EVIDENCE. *See* WITNESS.
admissibility of opinion in matters of science, 886.
of underwriters as to materiality of facts, 889.
of experts in foreign law, 892.
extrinsic, when admissible to explain instrument, 566, 568.
specification, 511.
secondary evidence of written document, 896.
presumption *contra spoliatorem*, 892.
the effect of withholding, 893, 894.
presumption *ritè esse acta*, 896, *et seq.*
rule as to *res inter alios acta*, 908, *et seq.*
how qualified, 1st, judgments *in rem*, 910.
2nd, acts having legal operation, 913.
hearsay when admissible, 914, 919.
declaration against interest, 915.
in course of business, 918.
res gestæ, 920.
in treason and conspiracy, 922.
of wife or husband, 495, 928.

EX ANTECEDENTIBUS ET CONSEQUENTIBUS, &c., 533. *See* DEEDS, WILLS, STATUTES.

EX DOLO MALO NON ORITUR ACTIO, 684. *See* CONTRACT, FRAUD, JUDGMENT.

EX NUDO PACTO NON ORITUR ACTIO. *See* NUDUM PACTUM.

EXECUTIO JURIS NON HABET INJURIAM, 121. *See* ARREST, TRESPASS, SHERIFF.

EXECUTION,
priority of Crown, 66.

EXECUTOR. *See* PERSONAL REPRESENTATIVE, FIXTURES, TRESPASS.
right of retainer by, 209—10.

EXPRESSIO EORUM QUÆ INSUNT NIHIL OPERATUR, 625. *See* CONTINGENT INTEREST; TENDER.

EXPRESSUM FACIT CESSARE TACITUM, 606, *et seq.*

EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS, 606. *See* WARRANTY, CONTRACT, STATUTES.

EXTENT,
right of the Crown to priority under, 67.

FACTOR. *See* LIEN, PRINCIPAL AND AGENT; SALE OF GOODS.

FACTORS' ACTS, 762, 763.

FALSA DEMONSTRATIO NON NOCET, 584. *See* WILLS, LEASE, GRANT, DEED.

FELONY. *See* CRIMINAL LAW.
whether private remedy suspended by, 155, 203—5.

FERRY,
grantee of, liable to repairs, 606.
how protected, 607.

FICTION,
defined, 125.
presumption of law distinguished from, 125.
not applied where prejudice or injury would result, 127—9.
judicial day when divisible, 128.

FIXTURES,
division of subject, respecting right to, 391.
defined, 391.
right to, of heir against executor, 392.
relaxation in favour of trade, 393, 395.
of ornamental, 398.
of devisee against executor, 395.
of devisee and heir, 396.

FIXTURES (*continued*).
right to (*continued*).
of vendee against vendor, *ib.*
of mortgagee against mortgagor, *ib.*, 397.
valuation, 398.
of remainderman or reversioner against executor, 399.
of landlord against tenant, *ib.*
for agricultural purposes, 400.
tenant must remove during his term, 401.
effect of special usage as to, 402.
mining, rights of mine owner to, 403.

FOREIGN JUDGMENT,
obtained by fraud, void, 281.

FOREIGN LAW,
how proved, 892.

FORTIUS CONTRA PROFERENTEM, 548. *See* DEEDS, CONTRACT, WILLS, STATUTES, CROWN.
in contract for sale of land, 728—730.
for sale generally, 743, *et seq.*

FRANCHISE
granted by the Crown, when void, 47, 60.

FRAUD. *See* CONTRACT, JUDGMENT; LANDLORD AND TENANT; STATUTE OF LIMITATIONS, FOREIGN JUDGMENT, MISREPRESENTATION.
renders a transaction voidable, 289, 290.
definition of *dolus* and fraud, 685, 728, 743.
effect of, in vitiating contract, 686, 697.
deed, 687.
improper motive when implied, 748.
whether moral fraud necessary element, 750—757.
legal fraud, doctrine of examined, 750.
by agent in contracting, 783.
of corporation, 803.
by partner, 786.

FREIGHT. *See* CHARTER-PARTY, MONEY HAD AND RECEIVED.
follows property in vessel, 464

GAVELKIND, 335, 461

GENERAL WORDS. *See* DEED, WILL, STATUTE.
rule as to, 600 *et seq.*

GOODS. *See* SALE OF GOODS.

GRANT. *See* DEED.
what passes by, 446—448.
things necessarily incident to, 451.
ancient, how construed by usage, 638
title-deeds belong to purchaser, 458
of future property, when valid, 465, 466.
falsa demonstratio, 594.
no man shall derogate from his own, 166.

HÆREDITAS NUNQUAM ASCENDIT, 489.

HÆRES EST QUEM NUPTIÆ DEMONSTRANT, 480. *See* HEIR.

HEIR. *See* EXECUTOR, FIXTURES, MARRIAGE.
hæres est quem nuptiæ demonstrant, 480.
heir to the father is heir to the son, 482
former exception in case of attainder, 482, 348.
nullius filius cannot be, 483.
nemo est hæres viventis, 486.
relaxed interpretation of the term "heir," 487.
hæreditas nunquam ascendit, 489.
rule, how qualified by stat. 3 & 4 Will. 4, c. 106; 489, 490.
lineal descent preferred, 490.
exclusion of the half blood, 491.
did not hold on the descent of the Crown, 492.

HIGHWAY,
who liable for repair of, *ratione tenuræ*, 662, 663.

HOMICIDE,
in what cases excusable, 12.
distinction between justifiable and excusable, 12 (*s*).
in resisting entry, 405

HOUSE,
right of support to, 186–7, 351.

HUSBAND AND WIFE. *See* MARRIAGE CONTRACT, PRINCIPAL AND AGENT, WITNESS.

IGNORANTIA FACTI EXCUSAT, &c., 246. *See* MONEY PAID, SPECIFIC PERFORMANCE, CRIMINAL LAW.
meaning of rule, 247–8.
rule applied in equity, 256–260.

INDEMNITY ACTS,
through being retrospective involve injustice, 35 (*s*).

INDICTMENT,
one count in, may refer to another, 631
rejection of surplusage in, 583.

INFANT,
contract by, for necessaries, 493.
when contract by, binds parent, 494.
within what age he is *doli incapax*, 308.
malitia supplet ætatem, 309.
except in rape, 310.

IN FICTIONE JURIS SEMPER ÆQUITAS, &c., 124.

IN JURE NON REMOTA CAUSA, &c. *See* MARINE INSURANCE, BILLS OF LADING, NEGLIGENCE.
not applicable to cases of fraud or crime, 22–23.

INJURY. *See* MISFEASANCE, NUISANCE, REMEDY, KING.
where no action lies for, 186–90.
remedy by indictment, 197.
where caused by felonious act, civil remedy suspended till after trial, query, 155.
damnum absque injuriâ, 186–91.
damage caused by, when too remote, 199–200.
remedy by operation of law, 209–10.
doctrine of contributory negligence, 262.
trivial—*de minimis non curat lex*, 139.

IN PRÆSENTIA MAJORIS, &c., 105. *See* QUEEN'S BENCH DIVISION.

INSURANCE. *See* MARINE INSURANCE, POLICY OF INSURANCE.

INTENTION
deducible from acts, 293.
what, to constitute crime, 300, *et seq.*
bare, dispunishable, 305.

INTEREST
dependent on principal, 463.
when payable under 3 & 4 Will. 4, c. 42, 580, 581.

INVOLUNTARY ACTION. *See* NECESSITY.

JOINT DEBTOR,
absence beyond seas of, 852.

JUDGE. *See* JURY.
jurisdiction of, 75.
power to amend, 77.
at chambers, 77.
discretion, meaning of, 78–9.
no action lies against, 80–6.
unless where he exceeds his jurisdiction, 83–4.
distinction between judicial and ministerial act, 84–6.
appeal from, when, 79, 86.
of County Court, appeal from, 86.
new trial, limit of right to, *ib.*
construction of documents for, 97–9.
libel trial for, duty of, 101, 314.
malicious prosecution, duty of, 99.
nonsuit, when duty to, 103.
when disqualified by interest, 110–2, 115 (*s*).
misdirection of, 104.

JUDGMENT. *See* PLEADING, EXECUTION.
form of, against the Crown, 52.
nunc pro tunc, 117.
relation of, *ib.*
cannot be cited in argument in appeal, 160.
conclusive with respect to what parties, 321–325.
in ejectment, 326.
impeachable for fraud, 328.
obtained by collusion, 691.
presumption as to regularity of, 904-908.
recovered against joint debtor, 852.
in rem, 910 *et seq.*
in personam, *ib.*

JUDICIAL OFFICE, 75–106. *See* JUDGE, AWARD.

JUDICIAL AUTHORITY,
protection, afforded by to constable, 90-2.
to sergeant-at-arms, 89.
to persons by order of House of Commons, 89.

JURISDICTION. *See* JUDGE.
where judge exceeds, 83–4.
territorial limits of, 94.

JURY,
province of judge and jury defined, 96, 104.
on malicious prosecution, 99.
in libel, 101.

JURYMAN,
wrong, sworn by mistake, 593.

JUSTICE, mode of administering, 106–146.

JUSTICES,
liability of, 83.
cannot act when interested, 113–115.
party to be summoned before conviction by, 108.
cannot delegate their functions, 796–7.
proceedings before, 900.

KING. *See* CROWN.
maxims relating to, 40–74.
how subject to the law, 40–1.
case of prohibitions, 42.
twofold character of, 40.
is beneath the law, 42.
never dies, 43.
descent from, *ib.*
succession to real property in case of, 44.
ditto, personal, 45.
fiction of immortality not logically carried out, 45, 866.
can do no wrong, twofold meaning of this, 46.
grant by, when void, 47–51.
in case of patent, 49
how construed, 607.
remedy against, 51.

KING (*continued*).
petition of right, 51—58.
procedure, 51.
whether the subject can claim royal fiat as of right, 53.
where petition of right will lie, 54
not for negligence of the king's servants, 55.
subject's remedy in such cases, 51—55.
petition in respect of booty, &c., 56—8.
monstrans de droit, 58.
when to be made party to action by attorney, 59.
what favours cannot be conferred on subject by, 59, 60.
whether he can pardon, 60, n. (*s*).
right of, not barred by lapse of time, 61—64.
limitation of rule by statute, 62.
where property in chattel, &c., vests in, jointly with subject, 65.
execution at suit of, 66, 67.
not bound by statute unless named, 68.
examples, 68, 69.
rule, how restricted, 69—71, n. (*t*), 70.
sale in market, overt, not bound by, 68.
allegiance to, cannot be abjured at common law, 71—74.
but may since Naturalization Acts, 74.
not liable for personal negligence of his servant, 819, 820.
effect of ratification by, of act of officer, 831.

LAND,
legal definition of, 374, 376.
right to support of, 353.
liability in respect of injury to, 351—353.
through hazardous operations, *ib.*
liability of owner of, for nuisance, 816.

LANDLORD AND TENANT. *See* EJECTMENT, FIXTURES, LEASE, PROPERTY, SURRENDER.
acceptance of rent waiver of notice to quit, 165
apportionment of rent, when land lost by casualty, 227.
in case of eviction, 277.
landlord may not dispute his own title, 277.
liability of, premises being destroyed by fire, 228.
of tenant for waste, 380, 381.
where tenant may cut down trees for repairs, *ib.*

LANDLORD AND TENANT (*continued*).
right of tenant to emblements, 381—387.
to away-going crop, 387—390.
distress for rent, 408.
jus disponendi of landlord, 433.
liability on covenants running with the land, 442, 661.
custom of the country in farming, when admissible, 619.
covenant by tenant in exoneration of landlord, 646, 647.
qui sentit commodum sentire debet et onus, 661
applied to the liability of tenant to repair, *ib.*
liability in respect of nuisance, 816, 817.
liability of landlord for bailiff distraining, 820.

LARCENY
in respect of property found, 765, 766.

LAW
is founded in reason, 151
how this proposition must be understood, 155.
law not applied where reason inapplicable, 153.
examples, 153, 154.
regards the course of nature, 246.
ignorance of, does not excuse, 247, 261.

LAWS,
necessity of obedience to existing, 13, 14,
when opposed to law of God, 15, 16.
framed to meet cases of ordinary occurrence, 35—39.

LEASE. *See* LANDLORD AND TENANT.
exception of trees in, 154.
for what term warranted by power, 169.
where void or voidable, 172, 173.
certainty of, how ascertained, 578, 579.
rule as to *falsa demonstratio* applied to, 587, 588.
no warranty that premises are habitable, 727.
except in case of furnished house, 727.
nor of fitness in case of land, 726.

LEGES POSTERIORES PRIORES, &c., 21. *See* STATUTES.

LEX NON COGIT AD IMPOSSIBILIA, 237. *See* MANDAMUS, COVENANT, CONTRACT, SESSIONS.

LIBEL. *See* CASE, DAMAGES, JUDGE, JURY.
substantial damages recoverable though actual damage not proved, 196.
definition of, 310.
privileged communication, 311.
literary criticism, 312, 313.
what malice will sustain action for, 314.

LICET DISPOSITIO SIT INUTILIS. *See* GRANT, WILL.

LIEN. *See* LANDLORD AND TENANT, PRINCIPAL AND AGENT.
of a factor on goods of his principal, 648.
of a banker, *ib.*

LIGHT,
prescriptive right to enjoyment of, 363, 364.

LIMITATION OF ACTIONS,
in case of Crown, 61—64.
Crown cannot avail of against petition of right, 58, n. (*a*).
concealed fraud, 281.
operation of, how prevented, 612.
appropriation of payments in reference to, 772, 773.
acknowledgment of debt barred by, 714.
policy of statutes for, 846.
ejectment, 847.
debt and covenant, *ib.*
on simple contracts, 848.
on merchants' accounts, 850.
effect of part-payment by one contractor, 852.
in case of absence beyond seas of joint debtor, *ib.*
ex delicto, 853.
prescription, *ib.*
runs from what time, 853—855.

LOGIC, RULES OF, 147—179.

LUNATICS,
saving in favour of, in Statute of Limitations, 851.

MAGISTRATES. *See* JUSTICES.

MAINTENANCE, 689 n. (*a*).

MALICIOUS PROSECUTION. *See* JUDGE, JURY.

MANDAMUS
does not lie to do an impossibility, 238, 239.

MARINE INSURANCE,
proximate cause of loss what, 211, 212.
perils of seas, loss what referable to, 213, 214.
how defined, 217.
evidence as to disclosure of facts and risk, 889.

MARKET OVERT. *See* SALE OF GOODS.
defined, 764.
Crown not bound by sale in, 68.
sale in, 764, *et seq.*
custom of London, 764.

MARRIAGE CONTRACT.
extinguishes a debt between the parties, 120.
exceptions, *ib.*
consensus facit matrimonium, 468—470.
per verba de præsenti, 469.
per verba de futuro, 474.
between parties under age, 475.
consent of parents or guardians, 476.
of members of the royal family, 477.
according to the *lex loci*, for what purposes valid, 478—480.
at British embassies, &c., 480, n. (*e*).
contract for, how discharged, 839.
proof of foreign law respecting, 891.
presumption in favour of, 901.

MASTER AND SERVANT. *See* PRINCIPAL AND AGENT.
homicide justifiable in defence of one another, 12.

MASTER AND SERVANT (*continued*).
servant justified for acts done in defending master from felony, 13.
communication of the character of a servant, when privileged, 312.
what constitutes the relation of, 802, 803.
respondeat superior, 798.
liability of ship-owner, 800.
job-master, 809.
qualification of general rule, 804.
wilful act of servant, *ib.*
contractor not a servant, 806.
employers of, when liable, 807.
action by master for death of servant, 868.
master not generally liable for injury by fellow-servant, 809—815.
Employers' Liability Act, 815, 816.
liability of public functionaries, 817.
of sheriff, 805.
of Crown for act of its servants, 51.
of servants of the Crown, 819, 820, 831.
of master criminally, 820 n. (*k*).

MELIOR EST CONDITIO POSSIDENTIS, 667
See EJECTMENT, TITLE, &c., *Par Delictum*.

MERGER,
definition of, 170.

MINERALS. *See* LEASE.
owners of, obligations of, 354, 355.
property in, 375.
reservation of, to grantor, 446, 450.
effect of grant of, 447 n. (*h*).

MINING FIXTURES. *See* FIXTURES.

MISCHIEVOUS ANIMALS,
liability of owner of, 368.

MISDEMEANOR,
conviction for lesser in charge of greater, 171.

MISFEASANCE, 193.

MISREPRESENTATION,
in law and equity, 730.
what relief granted in respect of, 730—733.
cases as to compensation examined, 731, 732.
what constitutes deceit in action for, 748.

MODUS ET CONVENTIO VINCUNT LEGEM, 645. *See* CONTRACT.

MONEY HAD AND RECEIVED,
where the action for, lies, 61, 251—2—3.
action for freight on treasure paid by captain of a king's ship, 250.

MONEY PAID. *See* PAYMENT.
where recoverable, and where not, 250—255.
voluntary payment, 266.
compulsory payment, 267—273.

MONSTRANS DE DROIT, 58—9.

MORTGAGE,
priority amongst mortgagees, 338, 339.
doctrine of tacking, 340.

NECESSITY,
voluntary and involuntary acts, 10.
compulsion explained, 10.
by husband, 10.
by violence, 11.
by necessity, 11.
in sense of Lord Bacon, 12.
self-preservation, 12.
obedience to existing laws, 12, 13.
in case of sheriff, 13.
arising from acts of another person, 14.
limitation of, *quoad jura privata*, 14, 15.

NEGLIGENCE,
contributory, when no defence, 216.
what is *primâ facie* evidence of, 298—300.

NEGLIGENCE (*continued*).
example of, 365, 366.
in keeping dangerous instruments, 366.
mischievous animals, 368.
animals *mansuetæ naturæ*, 369.
doctrine as to, in connection with negotiable instruments, 670—672.

NEGOTIABLE INSTRUMENT,
title to by transfer, 767.

NEMO DEBET BIS VEXARI, 316. *See* JUDGMENT, RES JUDICATA, AWARD, CRIMINAL LAW, MAXIM, HOW QUALIFIED, 332.

NEMO DEBET ESSE JUDEX IN PROPRIA, &c., 110. *See* JUSTICE.

NEMO EST HÆRES VIVENTIS, 486. *See* HEIR.

NEMO PATRIAM EXUERE, &c., 71. *See* ALLEGIANCE.

NEMO TENETUR SEIPSUM ACCUSARE, 922. *See* WITNESS, EVIDENCE, HUSBAND AND WIFE.

NEW TRIAL,
limit of right to, 86.
on account of misdirection, 104.
not granted where damages are small, 138.

NON FEASANCE, 193.

NON POTEST EXCEPTIO, &c., 158.

NONSUIT, 103. *See* JUDGE.

NOSCITUR A SOCIIS, 541. *See* DEEDS; WILLS; STATUTES; POLICY OF INSURANCE.

NOVA CONSTITUTIO, 28. *See* STATUTES.

NUDUM PACTUM.
in Roman law, 699.
in English law, 699, *et seq.*
consideration requisite to sustain a contract in general, 702—709.
a contract under seal, 701.
good, *ib.*
valuable, *ib.*
a simple contract, 702.
bill of exchange, promissory note, 709.
whether moral obligation is sufficient, 708.
consideration executed, 710, 712, *et seq.*
implied request, 711.
allegation of request, 711—713.
precedent good consideration how revived, 714, 715.
concurrent, 710, 721.
promise express or implied, 718, 719.
continuing, 722.
executory, 710.

NUISANCE,
action for, 361, 363.
liability of owner of realty for, 816.

NULLUM TEMPUS OCCURRIT REGI, 61.
See LIMITATION OF ACTIONS.

NULLUS COMMODUM CAPERE POTEST, &c., 273. *See* PRINCIPAL AND AGENT, LANDLORD AND TENANT, ESTOPPEL, CONTRACT, ALLEGANS CONTRARIA.
illustration, 274—5,
inapplicable where right of third party affected, 291.

OMNE MAJUS CONTINET, &c., 168. *See* TENDER; MERGER.

OMNIA PRÆSUMUNTUR CONTRA SPOLIATOREM, 892. *See* EVIDENCE.

OMNIA PRÆSUMUNTUR RITE ESSE ACTA. *See* EVIDENCE.

OMNIA PRÆSUMUNTUR RITE ESSE ACTA, 896. *See* EVIDENCE, PUBLIC OFFICER, MARRIAGE PROCESS.

OMNIS INNOVATIO PLUS PERTURBAT, 141. *See* PRECEDENT.

OMNIS RATIHABITIO ET MANDATO PRIORI ÆQUIPARATUR, 822. *See* PRINCIPAL AND AGENT.

OPTIMUS INTERPRES RERUM USUS, 871. *See* CUSTOM, EVIDENCE, CONTRACT, DEEDS, STATUTES.

OUTLAWRY,
in another action, no bar in proceedings to reverse, 160.

PAR DELICTUM,
rule stated, 673, 676.
applied to illegal agreement, 673.
wager, 674.
joint tort-feasors, 682.
test applicable as to, 676.
rule as to, in equity, 683.
melior conditio possidentis, when applied, 674, *et seq.*, 678.

PARDON,
cases in which the Crown cannot at common law grant, 60—10.
statutes conferring on Crown power to, 60.

PARTNER. *See* PRINCIPAL AND AGENT.
where party represents himself to be, 164.
liability of retiring, 286.
right of survivorship between, 427.
when executors of a deceased may take his place, 648.
responsibility of, how created, 785.
for fraud of copartner, 785—6.

PATENT,
licensee cannot dispute validity of, 164.
who is entitled to, 343, 344.
first and true inventor, 344, 345.
construction of, 509.
specification of, how construed, 510.
extrinsic evidence to explain, 511.

PAWNBROKERS,
some acts relating to, 765.

PAWNEE,
interest of, in pledge, 444.
sale by, 767.

PAYMENT. *See* MONEY PAID.
application of, to what debts by creditor, 772, 774, 775.
by bill or note discharges debt, 776.
of lesser sum does not discharge debt, 843.

PERITO EST CREDENDUM IN SUA ARTE, 885. *See* EVIDENCE.

PERSONA CONJUNCTA ÆQUIPARATUR, 493. *See* INFANT, HUSBAND AND WIFE.

PERSONAL REPRESENTATIVES. *See* ADMINISTRATOR, FIXTURES, TRESPASS.
executor may pay himself before other creditors, 210.
de son tort, 210.
may sue for breach of covenant committed in testator's lifetime, 856.
on what contracts they may sue, 856, 857.
what rights of action do not pass to, 857, 858.
for what torts they may sue, 860, 861.
liability for contracts and upon covenants of testator or intestate, 858, 859.
for torts, 865.
legal possession of, before probate, 861, 862.

PETITION OF RIGHT. *See* KING.

PLACITA JURIS, Lord Bacon, as to, 9.

PLEADING,
surplusage in, 583, and n. (*p*).

POLICY OF INSURANCE,
revival of, 254.
interpretation of, 511.
application of, *noscitur à sociis*, 542, 543.
concealment in reference to, 750
whether affected by conduct of master and crew, 800.
how vitiated, 750.
evidence in action on, 888—90.

PRACTICE,
of Courts, necessity of adhering to rules of, 129—131.

PREAMBLE. *See* STATUTE.

PRECEDENTS, JUDICIAL,
settled law, when not disturbed, 143, 641.
exceptions, 143.

PRESUMPTION, 125. *See* EVIDENCE.
in favour of title, 901, 903.

PRESUMPTION OF LAW. *See* FICTION.

PRINCIPAL AND AGENT. *See* CAVEAT EMPTOR, CONTRACT LIEN, MASTER AND SERVANT.
fraud of agent, when principal liable for, 276.
ratification of contract, 653.
general rule, *qui facit per alium facit per se*, 777.
payment to or by agent, 778, 779.
payment to a principal's agent, when a discharge, 778, 779.
delivery of goods to carrier, 780.
agency for sale of goods, 781.
el credere, 781.
ability of agent, 782, 785.
co-partnership, 785, 786.
railway companies, 787.
agency, how constituted, 789.
wife, when agent of husband, 792.
sheriff, 793.
master of ship, 792.
respective liability for tort, 798.
agent cannot delegate his authority, 794.
except in certain cases, 795.
by custom of trade, 797, 798.
magistrate cannot delegate, 797.
ratification of agent's act, 823, 827.
in actions for tort, 825.
whether any for crime, 830.
relationship must exist at time of agent's act, 826.

PRINCIPAL AND SURETY.
surety, when released, 658, 659.

PRIVILEGED COMMUNICATIONS. *See* LIBEL.

PROCESS OF COURT,
mistaken serving of, whether actionable, 190.
legality, when presumed, 904—908.

PROPERTY. *See* ALIENATION.
mode of acquiring, 335—347.
personal, follows law of owner's domicile, 485.
real, follows *lex situs*, 484.

PUBLIC COMPANIES, 4—7.

PUBLIC AND PRIVATE ACTS,
distinction between, 7.

PUBLIC WELFARE, individual rights cede to, 1, *et seq.*

PUBLIC OFFICERS,
official character presumed, 899.
presumption as to execution of documents by, 900.

QUANDO JUS DOMINI, &c., 65. *See* KING.

QUARE IMPEDIT,
by tenants in common, 246.

QUEEN. *See* CROWN, KING.

QUEEN'S BENCH DIVISION,
power of, over inferior Courts, 105, and n. (*t*).

QUI HÆRET IN LITERA HÆRET IN CORTICE, 641. *See* DEEDS, CONTRACTS, STATUTES.

QUI JUSSU JUDICIS NON VIDETUR DOLO, &c., 88. *See* JUDICIAL AUTHORITY, STATUTORY PROTECTION.

QUI PER ALIUM FACIT PER SEIPSUM FACERE VIDETUR. *See* PRINCIPAL AND AGENT.

QUI PRIOR EST TEMPORE, &c., 335. *See* TITLE, MORTGAGE, BILLS OF SALE, PATENTS, BOTTOMRY BONDS.
exceptions in case of, 340.

QUI SENTIT COMMODUM, &c., 661. *See* LANDLORD AND TENANT, PRINCIPAL AND AGENT, HIGHWAY.

QUIA EMPTORES, statute of, 416.

QUICQUID PLANTATUR SOLO, &c., 376. *See* LANDLORD AND TENANT, FIXTURES.

QUICQUID SOLVITUR, SOLVITUR SECUNDUM MODUM, &c., 770. *See* PAYMENT, LIMITATIONS OF ACTIONS.

QUILIBET RENUNCIARE POTEST PRO SE, &c., 655. *See* CONTRACT, BILLS OF EXCHANGE, PRINCIPAL AND SURETY.

QUOD AB INITIO NON VALET, &c., 171.
qualification of rule, 174, *et seq.*

QUOD REMEDIO DESTITUITUR, &c., 206. *See* REMITTER, RETAINER.

QUOTIES NULLA AMBIGUITAS NULLA EXPOSITIO, 573 *See* AMBIGUITY, DEEDS, STATUTES.

RAILWAY ACTS,
construed strictly, 4, 559.

RAILWAY COMPANY,
goods carried by, at owner's risk, 265.
money exacted by, recoverable, 270, 271.
like other carriers as to delivery of goods, 730.
implied authority of station-master of, *ib.*
liable in trover for conversion by agent, 799.
may be liable for an assault ratified by, 828.
liability of committee-men, 787.

RATE,
no presumption against retrospective, 32, n. (*n*).

RELATION,
doctrine of—with respect to judgment, 117.

REMEDY,
statutable, when only, 185, 198.

RES INTER ALIOS ACTA, &c., 908. *See* JUDGMENT, EVIDENCE.

RES IPSA LOQUITUR, 298. *See* NEGLIGENCE.

RES MAJIS VALEAT QUAM PEREAT, 498. *See* DEED, WILL, STATUTES, CONTRACT.

RESPONDEAT SUPERIOR, 798. *See* MASTER AND SERVANT, PRINCIPAL AND AGENT, LANDLORD AND TENANT, CONTRACTOR.

RES JUDICATA,
essentials of plea of, 318.
doctrine of law as to, 321.

RETAINER,
doctrine of, 209.

REVERSIONER. *See* EXECUTOR, FIXTURES.
when he may maintain action, 372.
whether liable for nuisance, 816, 817.

REX NON SUB HOMINE, &c., 40. *See* KING.

REX NUNQUAM MORITUR, 43. *See* KING.

REX NON POTEST PECCARE, 46. *See* KING.

REX NON POTEST GRATIAM, 59. *See* KING.

ROY N'EST LIE PER ASCUN STATUTE, 68. *See* KING.

SALE OF LAND. *See* FRAUD, MISREPRESENTATION.
warranty of title in Civil Law, 723.
in English Law, 724.
purchaser must examine, 724.

SALE OF GOODS. *See* CAVEAT EMPTOR, CONTRACT, MARKET OVERT.
effect of a sale on credit, 648.
time, when the essence of contract, *ib.*
by description, 734.
sample, 735.
warranty, definition of, 734, 735.
distinguished from description, 735.
from representation, 746.
as to quality, 735—743.
express, 736.
mere commendation is not, 736.
implied, 738.
in what cases, 740.
in sale of provisions, 742.
as to title, 757—761.
rule of Civil Law, 757.
general rule of English Law, 757, 759.
rule in America, *ib.*
Mr. Benjamin's view, 759.
special circumstances may create, 758.
implied, when subject matter unascertained, 760.
title, who may confer, 761.
general rule, 761.
exceptions,
possession with apparent ownership, 761—763.
factors and consignees, 762—763.
sale in market overt, 764.
sale by pledgee, 767.
in case of stolen goods, 765—767.
where possession fraudulently obtained, 766, 767.
payment to true owner, sale by another, 760.
of chattel containing concealed property, 769.

SALUS POPULI SUPREMA LEX, 1, 9.

SERGEANT-AT-ARMS, 89. *See* JUDICIAL AUTHORITY.

SESSIONS,
"appeal to next," meaning of, 245.

SEYMAYNE'S CASE, 404—414.

SHERIFF. *See* EXTENT.
liability of, for ministerial act, 14, 15.
for arrest, 122, 123.
action against, for an escape, 192.
when liable for act of bailiff, 793.
when a trespasser *ab initio*, 294.
when he may break house, 406.
execution at suit of Crown, 407, 408.
right to break open inner doors, 409, 410.
may summon the *posse comitatûs*, 453.
liability of, for executing writ after a *supersedeas*, 805.

SHIPOWNER,
authority of master of ship, 792.
liability of owner for act of crew, 800, 801.

SIC UTERE TUO UT ALIENUM NON LÆDAS, 347. *See* LAND, WATER, LIGHT, NUISANCE, NEGLIGENCE.

SLANDER. *See* LIBEL, CASE.

SPECIAL VERDICT,
how construed, 156.

SPECIALITY,
how discharged, 834.

SPECIFIC PERFORMANCE,
mistake of fact, when a ground to refuse, 260.
modus et conventio applied to, 689.
misrepresentation, effect of, 730—733.

STATUTE OF FRAUDS. *See* CONTRACT.
what constitutes sufficient memorandum under, 630.

STATUTES. *See* BYE-LAW, CLAUSULA DEROGATORIA, INDEMNITY ACTS, RAILWAY ACTS, RATE.
construction of, as to compensation, 4—7.

STATUTES (*continued*).
distinction between public and private, 7.
repeal of prior statute, how effected, 21—23, 533.
when implied, 22.
concurrent efficacy of, 24.
effect of repeal, 25.
when Act begins to operate, 26.
common law yields to, 27.
ancient custom yields to, *ib.*
when not revived, 26.
retrospective, defined, 28.
generally not retrospective, 28.
may be construed retrospective without express words, 29.
dealing with procedure are retrospective, 29.
rule as to retrospective, how limited, 32—34.
criminal, not retrospective, 35.
intended to meet ordinary circumstances, 35, 38.
casus omissus in, 39.
void, where opposed to the law of God, 15, 16.
how far the Crown is bound by, 68—71.
date from the giving of the royal assent, 26.
construction of, how guided by convenience, 179.
authority, when implied from, 452.
where words applicable to inferior degree are used, 605, 606.
to be construed according to maker's intention, 539, 620, 643.
penal—construction of, 527.
general principles of construction, 525, 526.
founded on intentions of Parliament, 526.
every word should take effect, 526, 539.
words to be construed in ordinary sense, 531, 539.
preamble, how limited by, 529.
headings and recitals, 530.
technical terms, 532.
ex antecedentibus et consequentibus, 539.
full effect to be given to words of, 539.
decisions on similar words in other Acts, 540.
noscitur a sociis, applicable in construction of, 541, 546, 547.
fortius accipiuntur contra proferentem applies only in case of private, 556, 557.
construction, where no ambiguity, 577.
a verbis legis non est recedendum, 577.
verba generalia in, 605, 606.

STATUTES (*continued*).
general principles of construction (*continued*).
expressum facit cessare tacitum, 620, 621.
exceptions and provisoes in, 634, 635.
literal construction, how far followed, 643.
guided by contemporaneous opinion, 639.
evidence of usage to explain, 884.
acts relating to public companies, 604.
application of maxim *expressio unius*, &c., to construction of, 620, 621.

STATUTES CITED.

13 Ed. 1, st. 1, c. 23; 856 n. (*r*).
st. of West. 2, c. 1; 417.
st. of West. 2, c. 18; 459 n. (*t*).
st. of West. 2, c. 24; 183.
18 Ed. 1, st. 1, c. 1; 416.
17 Ed. 2, c. 6; 416.
4 Ed. 3, c. 7; 861.
20 Ed. 3, c. 1; 63, n. (*i*).
25 Ed. 3, st. 5; 861, n. (*u*).
31 Ed. 3, st. 1, c. 11; 856, n. (*r*).
34 Ed. 3, c. 15; 417.
5 Ric. 2, c. 7; 414.
4 Hen. 7, c. 24; 419, n. (*g*).
21 Hen. 8, c. 11; 766, n. (*m*).
28 Hen. 8, c. 11; 383.
32 Hen. 8, c. 1; 420.
c. 34; 476.
c. 36; 419.
33 Hen. 8, c. 39; 66, n. (*y*), 166.
34 & 35 Hen. 8, c. 5; 419, n. (*g*), 420.
c. 20; 447, n. (*z*).
5 & 6 Ed. c. 16; 743.
2 P. & M. c. 7; 765, n. (*h*).
13 Eliz. c. 4; 66, n. (*z*).
c. 10; 172.
27 Eliz. c. 4; 520.
31 Eliz. c. 5; 848, n. (*p*).
c. 12; 675 n (*h*).
43 Eliz. c. 2; 68, 494, 621.

STATUTES CITED (*continued*).
1 Jac. 1, c. 21 ; 765.
21 Jac. 1, c. 3 ; 344.
c. 16 ; 62, 847, 849, 851, 853, 855, n. (*q*).
12 Car. 2, c. 24 ; 420.
17 Car. 2, c. 8 ; 117, n. (*b*).
29 Car. 2. c. 3 ; 30.
c. 7 ; 17.
30 Car. 2, st. 1, c. 7 ; 865, n. (*q*).
4 & 5 W. & M. c. 24 ; 865, n. (*q*).
7 & 8 Will. 3, c. 25 ; 681.
9 & 10 Will. 3. c. 7 ; 223, n. (*l*).
c. 15 ; 87.
10 & 11 Will. 3, c. 17 ; 680.
13 Will. 3, c. 2 ; 82, n. (*a*).
4 Ann. c. 16 ; 655, 851.
6 Ann. c. 31 ; 228, n. (*b*).
8 Ann. c. 19 ; 364.
10 Ann. c. 23 ; 681.
1 Geo. 1, st. 2, c. 13 ; 36.
11 Geo. 2, c, 19 ; 38, 294, 385.
12 Geo. 2, c. 28 ; 680.
17 Geo. 2, c. 38 ; 295.
19 Geo. 2, c. 13 ; 471.
24 Geo. 2, c. 44 ; 91, 92.
26 Geo. 2, c. 33 ; 176.
1 Geo. 3, c. 23 ; 82, n. (*c*).
6 Geo. 3, c. 53 ; 36.
9 Geo. 3, c. 16 ; 62.
12 Geo. 3, c. 11 ; 71.
14 Geo. 3, c. 78 ; 647.
32 Geo. 3, c. 58 ; 62.
c. 60 ; 101.
33 Geo. 3, c. 13 ; 26.
39 & 40 Geo. 3, c. 98 ; 424, 465, n. (*i*).
43 Geo. 3, c. 37 ; 924.
53 Geo. 3, c. 127 ; 851.
59 Geo. 3, c. 31 ; 57.
3 Geo. 4, c. 126 ; 162.
4 Geo. 4, c. 34 ; 333.
4 Geo. 4, c. 76 ; 470, 476.
c. 83 ; 439.

STATUTES CITED (*continued*).
4 Geo. 4, c. 91; 480, n. (*e*).
5 Geo. 4, c. 83; 547.
6 Geo. 4, c. 94; 439, 762.
7 & 8 Geo. 4, c. 29; 75, 93, 765, n. (*k*).
c. 52; 926.
c. 75; 547.
9 Geo. 4, c. 14; 34, 794.
c. 91; 480, n. (*e*).
11 Geo. 4 & 1 Will. 4, c. 68; 463.
1 & 2 Will. 4, c. 41; 175.
2 & 3 Will. 4, c. 71; 364, 371.
c. 76; 365.
c. 100; 640.
3 & 4 Will. 4, c. 15; 302.
c. 27; 209, 847, 850, n. (*y*), 851.
c. 42; 580, 847, 851, 860.
c. 74; 419.
c. 106; 468, 482, 483, 494, 489, 492, 49[illegible].
5 & 6 Will. 4, c. 50, sec. 78; 319.
c. 83; s. 1, 50, n. (*q*), 479.
6 & 7 Will. 4, c. 85; 474, 476, n. (*x*), 477.
1 Vict. c. 22; 477.
c. 26; 420, 466, n. (*m*), 604, n. (*a*).
2 & 3 Vict. c. 85; 582, n. (*m*).
3 & 4 Vict. c. 9; 89.
c. 52; 44, n. (*l*).
c. 72; 477.
4 & 5 Vict. c. 1; 33.
5 & 6 Vict. c. 39; 439, 763.
c. 45; 346, n. (*t*), 347.
c. 83; 344.
c. 93; 301.
c. 97; s. 4; 94, n. (*o*).
6 & 7 Vict. c. 18; s. 4; 582, n. (*m*).
c. 73; 34, n. (*l*).
c. 86; 802.
c. 96; 313, 319.
7 Vict. c. 12; 346, n. (*z*).
7 & 8 Vict. c. 76; 459, n. (*n*).
c. 81; 471.
8 & 9 Vict. c. 10; 236.

STATUTES CITED (*continued*).

8 & 9 Vict. c. 16; 843, n. (*o*).
c. 18; 69.
c. 20; 200.
c. 106; 436, 549, n. (*x*), 607, n. (*p*).
c. 109; 30.
9 & 10 Vict. c. 93; 203, 863.
10 & 11 Vict. c. 95; 346, n. (*t*).
11 & 12 Vict. c. 44; 84, n. (*l*).
12 & 13 Vict. c. 92; 113.
13 & 14 Vict. c. 21; 22, n. (*g*), 26, n. (*b*).
14 & 15 Vict. c. 25; 385, 400.
c. 99; 927.
c. 100; s. 9; 171, 306.
15 & 16 Vict. c. 12; 346, n. (*z*).
c. 24; 420.
c. 76; s. 139; 117, n. (*b*).
c. 85; s. 32; 37.
16 & 17 Vict. c 83; 495, 927.
c 119; 674.
17 & 18 Vict c 90; 718.
c. 104; s. 388; 819, n. (*g*).
c. 125; 32, 103, n. (*i*), 796, n. (*s*), 888, n. (*x*), 923, n. (*h*).
18 & 19 Vict. c. 15; 541.
c. 111; 440, n. (*z*).
c. 120; s. 76; 109.
19 & 20 Vict. c. 97; 343, 576, 794, 848, 850, 851, 852.
c. 101; s. 50; 328.
c. 119; 474, n. (*p*), 476, n. (*x*), 477.
c. 120; 419.
20 & 21 Vict. c. 43; 245.
c. 57; 427.
c. 85; 34, n. (*l*), 262, 426, 685, n. (*h*), 845, n (*e*).
21 & 22 Vict. c. 77; 419.
c. 90; 34, n. (*l*).
c. 93; 72, n. (*b*).
22 Vict. c. 32; 60, n. (*e*).
22 & 23 Vict. c. 35; 484.
c. 93; 484, n. (*u*).
23 & 24 Vict. c. 34; 51, 69.

STATUTES CITED (*continued*).

24 & 25 Vict. c. 96; 308, n. (*e*), 925.
c. 98; s. 14, 302, n. (*k*).
c. 100; 303, 332, n. (*p*), 405, n. (*e*), 765, 768, n. (*c*)
s. 55; 313.
25 & 26 Vict. c. 37; 44, n. (*n*).
c. 68; 346, n. (*t*).
c. 88; 332, n. (*o*).
26 & 27 Vict. c. 41; 866, n. (*t*).
c. 125; 28, n. (*o*).
27 & 28 Vict. c. 45; 419, n. (*k*).
c. 95; 203, n. (*n*), 863, 864, n. (*m*).
28 & 29 Vict. c. 60; 368, n. (*i*).
c. 104; 66, n. (*a*), 928.
30 & 31 Vict. c. 35; 765, n. (*k*), 766.
c. 142; s. 5; 194.
c. 142; s. 13; 86, n. (*r*).
31 & 32 Vict. c. 20; 72, n. (*b*).
c. 86; 442, n. (*f*).
c. 119; 864, n. (*m*).
32 & 33 Vict. c. 46; 66, n. (*y*).
c. 68; 495, 927.
33 Vict. c. 14; 73, n. (*h*), 74.
33 & 34 Vict. c. 29; s. 14; 32.
35 & 36 Vict. c. 93; 765, n. (*i*).
c. 94; s. 16; 302.
36 & 37 Vict. c. 61; 44.
c. 66; s. 24; 133.
s. 25; 442, n. (*p*).
s. 49; 86.
37 & 38 Vict. c. 38; s. 71; 339.
c. 54; 621.
c. 57; 847.
c. 62; s. 2; 655.
c. 78; s. 11; 724.
38 & 39 Vict. c. 55; s. 150; 663.
c. 87; s. 127; 339.
c. 92; s. 3; 400, n. (*q*).
40 Vict. c. 11; 115.
40 & 41 Vict. c. 39; 439, 763.
43 & 44 Vict. c. 42; 816.
c. 48; 19.

STATUTES CITED (*continued*).
44 & 45 Vict. c. 41; s. 18; 340, 341, n. (z), 724.
c. 60; s. 2; 313.
45 & 46 Vict. c. 38; 419, 430.
c. 75; 443, 495, 928.
46 & 47 Vict. c. 57; s. 25; 345.
s. 33; 344.
c. 61; s. 34; 400.

STATUTORY PROTECTION,
general remarks as to, 92.

SUMMA RATIO EST QUÆ PRO RELIGIONE FACIT, 51.

SUNDAY. *See* CONTRACT.
is not *dies juridicus*, 17.
the Lord's-day Act, 17.
trading on, 17.
recent legislation, 19.
bye-law to close navigation on, not valid, 20.

SURPLUSAGE. *See* DEED.

SURRENDER,
by operation of law, 653, 654.

TAXES,
to be imposed by clear authority, 3 and note (*l*).

TENANT FOR LIFE,
liability of, for waste, 380.
right of his representatives to emblements, 383.

TENDER,
when good, 168.
meaning of, 627.
to agent, 779.

TITLE. *See* LAND, MINERALS, PROPERTY, SALE OF LAND, SALE OF GOODS.
to unappropriated land, 335.
by escheat, 336.
elder shall be preferred, 337.
to chattels, possessory, valid against wrongdoer, 337.

TITLE (*continued*).
as between execution-creditors, 342.
by possession, 668.
by transfer of negotiable instruments, 767—768.
presumption of from possession, 901, 903

TORT. *See* CASE, INFANT, INJURY, TRESPASS.
contract distinguished from, 194.
joint tort feasors, no contribution amongst, 682.

TREES. *See* LANDLORD AND TENANT.

TRESPASS. *See* SHERIFF.
whether it lies against disseisor, or against his grantee, 127.
for taking goods of wrong party, 124.
lies for taking a horse, &c., damage feasant, if the horse were at the time under the plaintiff's care, 273.
ab initio by abuse of authority, 293—297.
for an assault committed abroad, 332.
whether it lies for unintentional injury, 348, 349.
lies for a direct injury, 349.
lies for overhanging building, 372.
not against freeholder at suit of occupier, 414.
by command of the Crown, 821.
by agent, adopted by principal, 827.
action of, by personal representatives, for injury to real estate, 862.
against personal representatives, 865—867.

TROVER,
for goods seized under execution against a third party, 284, 285.

UBI EADEM RATIO IBI IDEM JUS, 147. *See* DEEDS, BILLS OF EXCHANGE, BANKNOTES.
qualification of maxim, 151.

UBI JUS IBI REMEDIUM, 181.

UNUMQUODQUE DISSOLVITUR EODEM LIGAMINE, &c., 832. *See* CONTRACT, STATUTE, PAYMENT.

USAGE. *See* CUSTOM, EVIDENCE.

UTILE PER INUTILE NON VITIATUR, 581. *See* DEED, AWARD, PLEADING, INDICTMENT.

VERBA GENERALIA RESTRINGUNTUR, &c., 600.
See DEED, WILL, STATUTE.

VERBA RELATA INESSE VIDENTUR, 628.
See AFFIDAVIT, WILL, INDICTMENT, STATUTE, STATUTE OF FRAUDS.

VERDICT,
aider by, 174, *et seq.*

VIGILANTIBUS NON DORMIENTIBUS JURA SUBVENIUNT, 844. *See* LIMITATION OF ACTIONS.

VOLENTI NON FIT INJURIA, 262.
See CRIM. CON., MONEY PAID, NEGLIGENCE, RAILWAY.
illustrations, 263, 264.

VOLUNTARY ACTION. *See* NECESSITY.

WAIVER,
doctrine explained, 132.
error in pleading cured by, *ib.*
irregularity when cured by, 133.
implied, when, 134.
of right by married woman, 660.
none to detriment of public, 660.

WARRANTY. *See* SALE OF LAND, SALE OF GOODS.
when express, excludes implied, 615, 616.

WATER,
right in running water, how to be exercised, 356—358.
artificial, 358, 359.
subterraneous, 360.

WAY,
right of, when impliedly granted or reserved, 447.
reservation of, 450.
of necessity, 449, 452.

WIFE. *See* HUSBAND AND WIFE.

WILL,
property acquired subsequent to execution of, passes under, 466.
general principles of interpretation of wills, 512, 513.
founded on testater's intentions, 512, 515.
which must be collected from the words used, 515.
regardless of legal results, *ib.*
technical expressions, 517.
"children," 519.
"dying without leaving issue," 519, 520.
"estate," 520.
"heirs of the body," 521.
cy-près, 521.
doctrine of, when inapplicable, 522.
summary of doctrine as to construction of, 522, 523.
analogous principles of Roman law, 524.
noscitur à sociis applicable to, 543.
ex antecedentibus et consequentibus, 538.
when irreconcilable clauses in, last words will prevail, 538.
technical rules, 515, 517, 519.
conjunctive and disjunctive words in, 545.
fortius contra proferentem, does not apply to, 556.
ambiguities, 562, *et seq.*
patent, example of, 563.
qualification of rule as to, 566.
latent, example of, 567.
general remarks as to parol evidence to explain, 569.
falsa demonstratio non nocet, 584.
applies to remove surplusage, 585, 588.
not to supply defect, 590.
legal intendment, 597.
summary of the above principles, 598, 599.
verba generalia, how construed, 604.
doctrine of general intent qualified, 604, 605.
documents incorporated by reference, 631, 632.
exceptions and provisoes, 632, 633.
relative words, how referred, 637.
context, how used, *noscitur à sociis*, 543.

WITNESS. *See* EVIDENCE.
not bound to criminate himself, 923.
meaning of rule, 923, 924.

WITNESS (*continued*).
how qualified, 925, 926.
competency of, 927, 928.
husband and wife, 495, 928.
Criminal Code Bill, 928.

WORDS. *See* DEED, STATUTES, WILL.

WRIT,
what is good service of, 280.

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